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**ON THE ROAD TO CIVIL GIDEON:
FIVE LESSONS FROM THE ENACTMENT OF
A RIGHT TO COUNSEL FOR INDIGENT
HOMEOWNERS IN FEDERAL CIVIL
FORFEITURE PROCEEDINGS**

*Louis S. Rulli**

INTRODUCTION

Almost a half century ago, the Supreme Court unanimously held in *Gideon v. Wainwright* that a person accused of a crime could not be assured a fair trial unless counsel was provided to him.¹ On the following day, *New York Times* journalist Anthony Lewis reported that the Court had just handed down one of the most important decisions ever in the criminal law field.² The *Gideon* ruling overturned long-standing precedent established in *Betts v. Brady* that the Sixth Amendment's guarantee of counsel did not apply to the states, except in cases involving a death sentence or special circumstances.

The *Gideon* decision prompted national leaders to question whether the Court's landmark ruling should apply to civil proceedings when the poor's most vital interests were at stake. On Law Day in 1964, just one year after *Gideon*, Attorney General

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¹ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

² Anthony J. Lewis, *Supreme Court Extends Ruling on Free Counsel*, N.Y. TIMES, Mar. 19, 1963, at 1.

Robert F. Kennedy delivered an inspiring challenge to the nation in an address at the University of Chicago Law School in which he stated: “We have secured the acquittal of an indigent person—but only to abandon him to eviction notices, wage attachments, repossession of goods and termination of welfare benefits.”³ With growing acknowledgment that the phrase “equal justice under law” inscribed on the Supreme Court was incomplete without a right to counsel in basic civil matters, the civil *Gideon* movement was born.

It was also at this time that President Lyndon Johnson launched the War on Poverty, which for the first time provided federal funding to local legal services programs through the Office of Economic Opportunity. The purpose of the program was to have legal services lawyers for the poor “do no less for their clients than does the corporation lawyer checking the Federal Trade Commission for sloppy rulemaking, the union lawyer asking Congress for repeal of 14(b), or the civil rights lawyer seeking an end to segregation in bus stations.”⁴ In just a few short years, this new source of funding resulted in remarkable success for the poor in a succession of cases decided by the Supreme Court.⁵ These litigation victories demonstrated the profound impact lawyers could have when provided to represent the poor in civil matters. In turn, these favorable results generated substantial optimism that *Gideon*’s core principle of fundamental fairness might soon be

³ Robert F. Kennedy, *Law Day Address*, 13 U. CHI. L. SCH. REC. 24, 26 (1965); See also Edgar & Jean Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1336 n.27 (1964).

⁴ *History of Civil Legal Aid*, NAT’L LEGAL AID & DEFENDER ASS’N, http://www.nlada.org/About/About_HistoryCivil?printable=yes#oeo (quoting E. Clinton Bamberger, First Director of OEO Legal Services) (last visited Jan. 28, 2011).

⁵ See, e.g., *King v. Smith*, 392 U.S. 309, 333 (1968); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970); *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971); *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972). At the same time, legal services programs also scored significant victories for the poor in the circuit courts of appeals. See, e.g., *Edwards v. Habib*, 397 F.2d 687, 701 (D.C. Cir. 1968); *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1072–73 (D.C. Cir. 1970); *Escalera v. N.Y.C. Hous. Auth.*, 425 F.2d 853, 867 (2d Cir. 1970).

extended to civil proceedings.

This optimism drew to an abrupt halt with the Supreme Court's ruling in *Lassiter v. Department of Social Services of Durham County*.⁶ In *Lassiter*, the Court held that due process of law did not require the appointment of counsel for an indigent mother facing the government alone in civil court proceedings brought to involuntarily terminate her parental rights to her son.⁷ For many years after *Lassiter*, the civil *Gideon* movement was dormant in the face of increasingly conservative federal courts that appeared hostile to expanding fundamental rights.

Today, however, almost one-half century after *Gideon*, there is renewed optimism that a civil right to counsel to protect basic human needs is indeed possible and may even be relatively close at hand. With strong support from the organized bar and a coalition of diverse interests, there is a flurry of robust experimentation in the states reflecting intense determination to establish new standards in expanding access to counsel for the poor. Perhaps, most importantly, there is a growing acceptance across the land that fundamental fairness in our civil justice system requires much more than what the Supreme Court was willing to mandate in *Lassiter*.

The civil *Gideon* movement moves forward today largely in state and local legislatures, state courts, bar sponsored pilot programs, and in the court of public opinion. Over time, advocates hope that successful outcomes in state and local venues will effectively eliminate the *Lassiter* rule and create a favorable climate for the Supreme Court to reconsider and overrule its holding in *Lassiter*, just as it did in *Gideon* when the time was right to reconsider its prior holding in *Betts v. Brady*.

Part I of this Article briefly reviews the Supreme Court's decisions in *Gideon* and *Lassiter*. Part II examines recent developments within the states and among numerous bar associations that have pumped new life into the civil right to counsel movement. Part III takes a close look at reform legislation enacted by Congress in 2000 which established a right to counsel

⁶ *Lassiter v. Dep't of Soc. Serv. of Durham Cnty.*, 452 U.S. 18 (1981).

⁷ *Id.* at 32–33.

at public expense for indigent homeowners whose primary residences are the subject of federal civil asset forfeiture proceedings. The Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”) enacted a broad range of important forfeiture law reforms, including a statutory right to counsel for indigents through court appointments directed to the Legal Services Corporation. CAFRA’s right to counsel in these civil proceedings holds important lessons for the current civil right to counsel movement and Part IV concludes by identifying and describing five specific lessons that can be drawn from that successful legislative effort.

I. EARLY EFFORTS TO EXTEND A RIGHT TO COUNSEL TO CIVIL PROCEEDINGS

A. *The Story of Clarence Gideon*

Clarence Gideon, too poor to hire an attorney, was denied a lawyer to defend him against burglary charges brought against him by the state of Florida.⁸ Although the Sixth Amendment guarantees an accused the right to counsel in federal criminal proceedings, the Supreme Court had long held that the U.S. Constitution offered no similar guarantee in state criminal proceedings.⁹ On the basis of state law, a Florida trial judge denied Gideon’s respectful request for the appointment of counsel, stating to Mr. Gideon in open court:

I am sorry, but I cannot appoint counsel to represent you in this case. Under the laws of the State of Florida, the only time the court can appoint counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint

⁸ Bruce R. Jacob, *Memories of and Reflections About Gideon v. Wainwright*, 33 STETSON L. REV. 181, 200 (2003). Gideon was charged with breaking and entering a pool room with the intent to commit a misdemeanor on June 3, 1961. This charge was a felony under Florida state law. *Id.* at 201. Gideon was reportedly seen leaving the pool hall with a bottle of wine and his pockets filled with coins. *Id.* at 208.

⁹ *Betts v. Brady*, 316 U.S. 455, 471 (1942).

counsel to represent you in this case.¹⁰

Without a lawyer to assist him, Gideon was convicted at trial based largely on shaky eyewitness testimony. Sentenced to five years in prison, Gideon filed a habeas petition to the Florida Supreme Court seeking to attack his conviction on the grounds that he was wrongfully denied assistance of counsel.¹¹ After the Florida Supreme Court denied his petition, Gideon mailed a petition for certiorari to the U.S. Supreme Court asking the high Court to accept his case and review whether the denial of counsel was unconstitutional.¹² The Supreme Court granted review to consider whether its prior holding in *Betts v. Brady* should be reconsidered.¹³

Notably, one of the first things the Supreme Court did after granting review of Gideon's case was to appoint a lawyer to assist Gideon in his appeal.¹⁴ The Court chose a highly respected lawyer, Abe Fortas, to undertake this important task. Although the Court gave no formal reasons for its selection, it may be safely assumed

¹⁰ *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963). Arguably, the Florida judge was not correct when he stated that he could only appoint counsel in a capital case. He could have read the *Betts* decision to permit an appointment of counsel in noncapital felony cases under circumstances where such an appointment of counsel is necessary to provide a fair trial to Gideon. *See Jacob, supra* note 8, at 202.

¹¹ *Jacob, supra* note 8, at 212–13.

¹² *Id.* at 214.

¹³ *Betts v. Brady* involved a request for counsel by an accused who was indicted for robbery in Maryland state court. *Betts*, 316 U.S. at 456–57. *Betts* was too poor to afford a lawyer and his request for appointment of counsel was denied on the basis that Maryland law did not require appointment of counsel except in murder or rape cases. *Id.* at 457. *Betts* represented himself, was found guilty, and was sentenced to eight years in prison. *Id.* Upon review, the Supreme Court held that the trial court's refusal to appoint counsel for *Betts* did not necessarily violate due process guarantees. Using a "totality of the facts" analysis, the Court treated due process as less rigid and more fluid than other guarantees of the Bill of Rights, and held under the facts of the case that the denial of counsel was not offensive to common and fundamental understandings of fairness. *Id.* at 461–73.

¹⁴ The Supreme Court granted certiorari on June 4, 1962 and on June 25, 1962 appointed Abe Fortas, a highly respected partner at Arnold, Fortas & Porter, to represent Gideon. *Gideon v. Cochran*, 370 U.S. 932 (1962).

that the Court believed that Fortas had the intellectual firepower and ample resources to effectively represent Gideon and, equally importantly, to fully develop the important issues for a proper disposition by the Court.¹⁵

Fortas brought powerful advocacy to bear on behalf of Gideon. In his brief to the Court, Fortas argued that the Fourteenth Amendment required that counsel be appointed for an indigent defendant in every criminal case involving a serious offense because the aid of counsel is indispensable to a fair hearing.¹⁶ Urging the Court to reverse its holding in *Betts v. Brady*, Fortas' brief concluded with a passage originally written by Erwin Griswold and Benjamin Cohen in a letter to the editor of the *New York Times* published shortly after the Supreme Court's ruling in *Betts*:

[A]t a critical period in world history, *Betts v. Brady* dangerously tilts the scales against the safeguarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right to counsel to defend him. The right to counsel, for the poor as well as the rich, is an indispensable safeguard of freedom and justice under law.¹⁷

¹⁵ Gideon's request to the Supreme Court was for a "competent attorney to represent [him] in this Court." BERNARD SCHWARTZ, *SUPER CHIEF* 459 (1983). At the Court's conference, Chief Justice Warren suggested that Abe Fortas be appointed. *Id.* See also ANTHONY LEWIS, *GIDEON'S TRUMPET* 47 (1964), which briefly discusses the appointment of counsel for Gideon, noting that former law clerks to the justices are often appointed, as are law professors and established practitioners. But, "like other matters decided by the Supreme Court, the choice of a lawyer for an indigent petitioner is entirely in the bosom of the justices," Lewis writes. *Id.* The appointment of Fortas has double significance. First, the appointment of any counsel reaffirms that in the proceedings before it, the Supreme Court believes that indigent petitioners should be represented. Second, it is not simply a matter of having any counsel; the Court values the participation of a skilled lawyer who can assist the Court in its decision making while advocating for a client.

¹⁶ See generally Brief for the Petitioner, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155), available at 1962 WL 75206.

¹⁷ *Id.* The letter to the editor was dated July 29, 1942 and published on August 2, 1942 in direct response to the Supreme Court's ruling in *Betts v.*

At oral argument on January 15, 1963, Fortas told the justices that “a common man with no training in law cannot go up against a trained lawyer and win; you cannot have a fair trial without counsel.”¹⁸

Legal assistance provided to Clarence Gideon in his appeal undoubtedly made a difference.¹⁹ In March 1963 a unanimous Supreme Court overruled *Betts* and held that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”²⁰ This basic proposition was deemed so fundamental that the justices wrote in their opinion that “this seems to us to be an obvious truth.”²¹

Today, it is tempting to view the Court’s landmark decision as simply a quick stroke of the judicial pen resulting in sweeping constitutional change. Such an interpretation, however, would not do justice to the difficult battles that preceded the Court’s ruling in *Gideon* and made possible the overruling of longstanding court

Brady, which was decided on June 1, 1942. Griswold and Cohen expressed concern that the Court’s holding in *Betts v. Brady* had not attracted sufficient public attention. Benjamin V. Cohen & Erwin N. Griswold, *Denial of Counsel to Indigent Defendant Questioned*, N.Y. TIMES, Aug. 2, 1943, at E6. They argued that the fact that “it is not possible to assure counsel of equal talent to all is scarcely an adequate reason for denying to the poor any counsel at all.” *Id.* They also noted that most Americans, before *Betts*, would have believed that a right to counsel in a serious criminal case was already an established part of the Bill of Rights. *Id.*

¹⁸ See generally, LEWIS, *supra* note 15. Fortas argued that no person, however intelligent and smart, could be expected to represent himself effectively and that even Clarence Darrow felt he needed a lawyer when he had criminal problems. See also Jacob, *supra* note 8, at 296 n.477 (2003) (citing Robert J. Aalbert, *From the Classroom: Gideon’s Trumpet*, 12 J. LEG. STUD. EDUC. 321, 326 n.395 (1994)).

¹⁹ Justice Douglas called Fortas’ argument the best he had heard. See generally SCHWARTZ, *supra* note 15.

²⁰ *Gideon*, 372 U.S. at 344; see also SCHWARTZ, *supra* note 15 at 458, 460 (describing how *Betts v. Brady*, which held that an indigent defendant did not have a due process right to counsel in noncapital cases unless he could not obtain a “fair trial,” was overruled by the Supreme Court).

²¹ *Gideon*, 372 U.S. at 344.

precedent. Twenty-one years earlier in *Betts v. Brady*,²² the Supreme Court held that the Sixth Amendment did not mandate the provision of free counsel to indigent defendants accused of serious crimes in state proceedings. Advocates and academics promptly questioned the wisdom of the *Betts* rule.²³ In the years that followed *Betts*, many states developed their own paths and provided counsel through legislative or judicial means. By the time the Court was called upon in *Gideon* to reconsider its holding in *Betts*, twenty-two states sided with Clarence Gideon in amicus filings supporting his claim to appointed counsel. Over time, the *Betts* rule was largely swallowed by exceptions crafted by the states about evolving standards as to what fundamental fairness principles should require in court proceedings for those too poor to afford a lawyer.²⁴ Without these developments, it is uncertain when, or even if, the Supreme Court would have reconsidered its prior holding in *Betts v. Brady*.

B. The New Legal Services Program

Although *Gideon* gave the poor a right to counsel in serious criminal proceedings, it did not address their need for counsel in civil proceedings. Soon thereafter, advocates for the poor secured the birth of a new federal legal services program that opened the doors to the nation's courthouses for many of the poor. Congress passed the Economic Opportunity Act of 1964, establishing anti-poverty programs that made federal funds available for legal services to the poor. The Office of Economic Opportunity ("OEO"), led by Sargent Shriver, worked with local communities to solicit initial proposals for legal services funding, and by 1968,

²² See *supra* note 13 (describing *Betts v. Brady*).

²³ See e.g., Cohen & Griswold, *supra* note 17, at E6.

²⁴ See Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 533 (2006) (discussing the development of a right to counsel in the states through an expanding variety of special cases that over time eroded the *Betts* rule such that any serious criminal charge became viewed as a special circumstance warranting the appointment of counsel). See also *Gideon*, 372 U.S. at 350 (Harlan, J., concurring).

260 OEO programs were operating throughout the United States.²⁵ After political opposition to the young program took root in California under Governor Ronald Reagan, and later in the Nixon White House when President Nixon appointed outspoken legal services foe Howard Phillips to head OEO for the purpose of dismantling the program, support for an independent legal services program gained support. After a protracted legislative fight about the structure and scope of this new, independent entity, Congress passed the Legal Services Corporation Act of 1974. President Nixon's signature on the bill would be one of his last official acts before resigning from office that year.²⁶ Under the new Act, the legal services program would now be administered by a nonprofit corporation governed by an independent board of directors appointed by the President and confirmed by the Senate.²⁷

Much of the political opposition to the legal services program was generated by the enormous success that it quickly achieved once the nation's court houses were finally open to the poor. Attacking long-standing, systemic injustices that preyed upon the poor, federally-funded lawyers scored impressive victories in the Supreme Court and in many of the nation's circuit and district courts that began to balance the scales of justice that previously tilted strongly in the direction of government and large corporations. In a short period of time, legal services programs won landmark cases that had a profound effect upon the poor. In *Shapiro v. Thompson*,²⁸ *Goldberg v. Kelly*,²⁹ *Fuentes v. Shevin*,³⁰ *King v. Smith*,³¹ and *Boddie v. Connecticut*,³² among others, the

²⁵ See ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW AND SOC. POL'Y SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 11 (2007), available at http://www.clasp.org/publications/legal_aid_history_2007.pdf.

²⁶ Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378.

²⁷ Legal Services Corporation Act, 42 U.S.C.A. § 2996c (West 2010).

²⁸ *Shapiro v. Thompson*, 394 U.S. 638 (1969).

²⁹ See generally *Goldberg v. Kelly*, 397 U.S. 254 (1970).

³⁰ See generally *Fuentes v. Shevin*, 407 U.S. 67 (1972).

³¹ See generally *King v. Smith*, 392 U.S. 309 (1968).

³² See generally *Boddie v. Connecticut*, 401 U.S. 371 (1971).

Supreme Court delivered vital pronouncements that would not have been possible without the availability of legal services to the poor in the new federal program.³³ Indigent Americans were beginning to enjoy the fruits of counsel for the first time in civil matters; however, they still did not have a *right* to that counsel.

*C. Court Action to Secure a Civil Gideon Falls Short in
Lassiter*

The principal effort to establish a right to counsel in civil matters came to the Supreme Court eighteen years later in a legal challenge involving the termination of a mother's parental rights to her child in *Lassiter v. Dep't of Soc. Serv. of Durham County*.³⁴ Abby Gail Lassiter had been accused of not providing proper medical care to William, her infant son. A North Carolina family court adjudicated William a neglected child and transferred his custody from Lassiter to the county department of social services. One year later, Lassiter was convicted of murder charges in an unrelated matter and began serving a lengthy sentence of imprisonment. Three years after removing William from Lassiter's care, the county department petitioned the court to terminate Lassiter's parental rights alleging that she had not contacted William for an extended period of time and had left him in foster care for two consecutive years without showing adequate progress at remedying the problems that led to his removal from her custody.³⁵

Lassiter was brought from prison to a family court hearing to answer charges that her parental rights to William should be terminated. When Lassiter asked for a postponement of the hearing

³³ The extraordinary record of success before the Supreme Court only tells a small part of the story. Legal services programs won cases in federal appellate and trial courts that established far reaching legal principles affecting the most essential needs of the poor. *See, e.g.,* Escalera v. N.Y. City Hous. Auth., 425 F.2d 853 (2d Cir. 1970); Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968).

³⁴ *See* Lassiter v. Dep't of Soc. Serv. of Durham Cnty., 452 U.S. 18, 21 (1981).

³⁵ *Id.* at 20–22.

in order to obtain counsel, the trial court refused.³⁶ The judge concluded that, despite Lassiter's poverty and incarceration, she had been given ample opportunity to obtain counsel for the hearing and that "her failure to do so [was] without just cause."³⁷

Without counsel, Lassiter tried unsuccessfully to represent herself and her parental rights were terminated.³⁸ On appeal, Lassiter argued that she was entitled to the assistance of counsel under the Fourteenth Amendment's due process clause since she was indigent and could not afford to hire counsel.³⁹ A state appeals court found that the assistance of counsel was not constitutionally mandated, and the North Carolina Supreme Court denied review. The United States Supreme Court decided to hear the case. After reviewing prior precedent in *Gideon*, *Argersinger*,⁴⁰ and *In re Gault*⁴¹ that required the appointment of counsel where a loss of liberty was at stake, the high Court held that as liberty interests diminish, so does an individual's right to appointed counsel.⁴² The

³⁶ *Id.* at 22.

³⁷ The Lassiter hearing was held on August 31, 1978. *Lassiter*, 452 U.S. at 21. In her own defense, Lassiter tried to cross-examine witnesses against her, but without much success. *Id.* at 53–56. The judge reminded her several times that she could only ask questions and that her questions were disallowed because they were really arguments, and not questions. *Id.* at 23. At the Supreme Court, the American Bar Association filed an amicus brief on the side of Lassiter in which it argued that involuntary termination of parental rights cases are prone to error and to ensure a fair hearing, an attorney must be made available at public expense. ABA Brief for Lassiter as Amicus Curiae Supporting Petitioner at 3–4, *Lassiter v. Dep't of Soc. Serv. of Durham Cnty.*, available at 1980 WL 340036 (No. 79-6432). The ABA's brief referenced heavily Lassiter's inability to conduct an effective cross-examination of agency witnesses who testified against her. *Id.* at 14. The brief argued that "without meaningful cross-examination, the risk of error in these cases substantially increases." *Id.* "Judges will rely more heavily upon the state's unchallenged presentation." *Id.*

³⁸ *Lassiter*, 452 U.S. at 21–24.

³⁹ *Id.* at 24.

⁴⁰ See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that counsel must be provided even where the crime is petty and the prison term brief).

⁴¹ See *In re Gault*, 387 U.S. 1, 4 (1967) (holding that a juvenile has a right to counsel where his freedom is curtailed by an institutional commitment, even though the proceeding is viewed as civil and not criminal).

⁴² *Lassiter*, 452 U.S. at 26.

Court denied *Lassiter*'s right to counsel after employing a balancing test weighing the due process factors identified in *Mathews v. Eldridge*⁴³ with the presumption against a right to counsel without a potential deprivation of physical liberty.⁴⁴ The Court stated, that "a wise public policy . . . may require . . . higher standards . . ." but the Fourteenth Amendment simply "imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair."⁴⁵

In the Court's view, *Lassiter*'s case did not involve expert witnesses, present any specially troublesome points of law, or provide a situation where the presence of counsel could have made a determinative difference in the outcome of the case. While the Court acknowledged that a parent has an important interest in the companionship, care, custody, and management of her child that warrants special deference, a majority of the justices did not believe that the case presented a situation that warranted overcoming the presumption against a right to counsel.

Lassiter is often erroneously regarded as standing for the inflexible principle that civil cases not involving a loss of liberty do not require the appointment of counsel. In fact, the Supreme Court held that federal courts should evaluate the need for a court-appointed counsel on a case by case basis, utilizing the *Mathews v. Eldridge* due process factors as a guide.⁴⁶ But the reality in busy trial courts is that a case by case approach often prompts judges to adopt an across the board rule from which they rarely deviate. Today, trial courts tend to ignore *Lassiter*'s instruction to inquire whether the *Mathews* factors might require the appointment of counsel in the cases before them and instead treat the *Lassiter*

⁴³ *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976) (articulating three elements that must be considered in a due process challenge: the private interests at stake, the government's interest, and the risk of an erroneous decision).

⁴⁴ *Lassiter*, 452 U.S. at 31.

⁴⁵ *Id.* at 33.

⁴⁶ See Michael Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 733, 734 (2006) (noting that while *Lassiter* created a presumption against the right to counsel in civil cases that do not involve a loss of liberty, it did establish a case-by-case approach to determine whether the presumption had been overcome).

holding as an absolute rule, except in the most extreme of circumstances.⁴⁷

In dissent, Justice Blackmun sharply criticized the *Lassiter* majority for adding the value of physical liberty, a “burdensome new layer” in his words, to the standard three-factor due process framework of *Mathews v. Eldridge*.⁴⁸ Justice Blackmun disagreed strongly with what he perceived as the Court’s retreat from the proposition that it look at a whole area (“decision making contexts”), and not at individual litigants, when determining if due process requires the appointment of counsel.⁴⁹ Justice Blackmun noted the Court’s reasoning in *Goldberg v. Kelly*,⁵⁰ in which the Court did not look merely at the circumstances of a particular litigant, but rather at welfare recipients as an entire class.⁵¹ In Justice Blackmun’s view, procedural norms must be based on the whole context, and not on the specifics of an individual litigant.⁵² Despite this strong dissent, federal courts have not reconsidered *Lassiter*’s holding in the decades that have followed and many believe that the Supreme Court is no more likely today to disturb *Lassiter*’s holding.⁵³

⁴⁷ See e.g., Jacob, *supra* note 8, at 202.

⁴⁸ *Lassiter*, 452 U.S. at 42 (Blackmun, J., dissenting).

⁴⁹ *Id.* at 49–50.

⁵⁰ See generally *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁵¹ See generally *id.*

⁵² The ABA resolution recognizes this basic principle and recommends that counsel be afforded in the most important subject matter areas involving basic human needs, rather than attempting to determine on a case-by-case basis the need for legal representation.

⁵³ Alan W. Houseman, *The Future of Civil Legal Aid: A National Perspective*, 10 UDC/DCSL L. REV. 35, 54 (2007); Dennis Kaufman, *The Tipping Point on the Scales of Civil Justice*, 25 TOURO L. REV. 347, 351 (2009); Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186, 194 (2006) (noting that advocates fear that the Supreme Court is not in any rush to expand the federal rights of indigent litigants); Meredith Hobbs, *Litigators Push for ‘Civil Gideon,’* THE RECORDER, Dec. 19, 2008, available at <http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202426606743&slreturn=1&hbxlogin=1> (citing conventional wisdom that the federal courts should be avoided because the current Supreme Court is too “conservative” for such a “liberal” idea as civil Gideon).

In the absence of a right to counsel, the poor have had very limited access to lawyers in civil matters.⁵⁴ The litigation successes of the federal legal services program generated substantial political opposition and led to drastic funding cuts in the 1980s under the Reagan administration and again in the 1990s, following the 1994 mid-term elections. In addition, Congress imposed substantial restrictions on the activities of legal services lawyers, cutting off the poor's access to lawyers in fundamental ways.⁵⁵ As inadequate funding levels were reduced even further and the legal services program again became political fodder, millions of Americans were left to handle their legal problems entirely on their own. Although legal aid programs enjoy renewed support today from public and private funding sources, the harsh reality persists that without a right to counsel in civil matters, access to legal help for millions of poor Americans remains beyond reach.⁵⁶ Especially in a weak economy, indigent litigants must fend for themselves.⁵⁷

⁵⁴ LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA (2007), *available at* <http://www.lsc.gov/JusticeGap.pdf>; AMERICAN BAR ASSOCIATION, CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS (1994), *available at* <http://www.nlada.org/DMS/Documents/1029845345.31/legalneedsstudy.pdf>. Numerous studies on legal needs are available through the NLADA website, *Access to Justice Support Project*, NAT'L LEGAL AID & DEFENDER ASS'N (2004), http://www.nlada.org/Civil/Civil_SPAN/SPAN_Library/document_list?topics=000055&list_title=State+Legal+Needs+Studies%3A+Reports.

⁵⁵ For example, Congress prohibited legal services programs receiving federal funds from engaging in class actions, seeking attorneys' fees, prisoner representation, representing individuals who were being evicted from public housing because they face criminal charges of selling or distributing illegal drugs, most activities involving welfare reform, lobbying, and representing people who are not U.S. citizens with certain limited exceptions. *See Omnibus Consolidated Rescissions and Appropriations Act of 1996*, Pub. L. No. 104-134, 110 Stat. 1321. In fiscal year 2010, Congress removed the restriction on collecting or retaining attorneys' fees. *See Consolidated Appropriations Act*, Pub. L. No. 111-117 (2010).

⁵⁶ See legal needs studies discussed *infra* note 54.

⁵⁷ *See, e.g.,* Terry Carter, *Judges Say Litigants are Increasingly Going Pro Se at Their Own Peril*, A.B.A.J. (July 12, 2010), http://www.abajournal.com/news/article/judges_say_litigants_increasingly_going_pro_se--at_their_own_/ (reporting on a survey conducted of ABA Judicial Division's National

II. THE ORGANIZED BAR TAKES A BOLD STAND

With a decisive loss in *Lassiter*, the movement to achieve a civil *Gideon* languished for many years. As federal courts became increasingly unreceptive to expansive readings of constitutional protections, advocates generally agreed that a landmark Supreme Court decision mandating a right to counsel in civil matters, similar to what the Supreme Court had done in *Gideon*, was not likely to be achieved in the near future.⁵⁸ Instead, proponents devoted their efforts to expanding access to counsel by creating justice commissions under the auspices of state supreme courts and uniting behind national efforts to increase federal funding for legal services to the poor. These efforts opened up access to counsel for perhaps millions of Americans in a broad range of civil matters, funded by state IOLTA programs, civil filing fees, bar registration fees, and a range of other mechanisms intended to boost legal services to the poor. Despite these important developments, advocates were unable to make substantial process at chipping away at the fundamental justice gap in America which, according to most studies, reveals that only 20 percent of poor Americans in need of legal help are able to be helped with current resources.⁵⁹ A study commissioned by the Legal Services Corporation found that for every indigent client who was able to get free legal help from a legal aid office another client entering with an equal need of help was turned away.⁶⁰ Without a right to counsel, the justice gap

Conference of State Trial Judges).

⁵⁸ Civil Gideon advocates generally agreed that they should avoid federal courts when trying to advance their efforts. *See, e.g.*, Kaufman, *supra* note 53, at 351 (noting that the conventional wisdom among civil Gideon advocates was to avoid federal courts based upon the assumption that the Supreme Court was too conservative to find a right to counsel in the constitution).

⁵⁹ *See infra* notes 81–842 for a study conducted by the American Bar Association and other studies of states citing the statistic; LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW INCOME AMERICANS, LEGAL SERVICES CORP. (2d ed. 2007), *available at* <http://www.lsc.gov/justicegap.pdf> (stating that less than one in five of the legal problems experienced by low-income people are addressed with the assistance of a private or legal aid lawyer).

⁶⁰ *See* LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN

remains as large as ever.

A. The ABA's Right to Counsel Resolution

In 2005, then ABA president Michael Greco commissioned a presidential task force on access to civil justice to study whether counsel should be provided as a matter of right in civil matters to those unable to afford counsel.⁶¹ The task force, chaired by Howard Dana, Jr., concluded that equality before the law has remained a woefully inadequate charity over the past 130 years which has not delivered justice for all. The task force recommended that the ABA support a right to counsel at the public expense in civil matters involving basic human needs.⁶² On August 7, 2006, the ABA House of Delegates adopted Resolution 112A calling upon federal and state jurisdictions to provide counsel as a matter of right at the public expense to low-income persons in adversarial proceedings involving "basic human needs," such as those involving "shelter, sustenance, safety, health or child custody."⁶³ The ABA resolution encouraged each jurisdiction to determine appropriate categories where the provision of counsel was most important and to develop local strategies for achieving this goal.

The ABA's action reignited a national movement in support of

AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2005), *available at* http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf.

⁶¹ See Michael S. Greco, President, Am. Bar Ass'n, Address to the Am. Bar Ass'n House of Delegates at the 2005 Annual Meeting 5 (Aug. 8, 2005), *available at* <http://abanow.org/wordpress/wp-content/files-flutter/1273007637grecohod0805.pdf>.

⁶² See Am. Bar Ass'n House of Delegates, *Task Force on Civil Justice, Report to the House of Delegates*, Res. 112A, AM. BAR ASS'N (Aug. 7, 2006), <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.

⁶³ *Id.* The ABA's resolution calls upon "federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction." *Id.*

a right to counsel that had begun to show promise in some states.⁶⁴ State and local bar associations agreed to co-sponsor the ABA resolution,⁶⁵ and academic institutions held conferences to reexamine the legal underpinnings of a civil Gideon.⁶⁶ The subject again became prominent in academic journals and practitioner publications.⁶⁷ Many states and localities soon followed this lead,⁶⁸ amidst new-found optimism that a right to counsel in essential civil legal matters might indeed be obtainable.

⁶⁴ See generally Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A. L. REV. 1087 (2009) (describing the enactment of laws expanding the right to counsel in civil cases).

⁶⁵ Among the co-sponsors were the Association of the Bar of the City of New York, King County Bar Association (WA), the Philadelphia Bar Association, the Maine State Bar Association, the Connecticut Bar Association, the Boston Bar Association, the Los Angeles County Bar Association, and a variety of others. For a complete list, see the ABA website, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES (Aug. 2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf> (last visited Aug. 24, 2010).

⁶⁶ See, e.g., Michael S. Greco, President, Am. Bar Ass'n, Keynote Address at 23rd Annual Edward V. Sparer Symposium: Civil Gideon: Making the Case (Mar. 28, 2006), available at http://www.klgates.com/files/Publication/657133a8-1f28-4b23-8eed-68c80a993521/Presentation/PublicationAttachment/2cd67c73-a372-4605-8f34-712879228d98/Greco_03_28_06.pdf; 2006 Edward V. Sparer Symposium, *Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context*, 15 TEMP. POL. & CIV. RTS. L. REV. 507 (2006). See also Symposium, *An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State*, 25 TOURO L. REV. 1 (2009); Symposium, *Access to Justice: It's Not For Everyone*, 42 LOY. L.A. L. REV. 859 (2009); Symposium, *A Right to Counsel in Civil Cases: Civil Gideon in Maryland & Beyond*, 37 U. BALT. L. REV. 1 (2007); Symposium, *ABA Symposium on Access to Justice*, 37 FORDHAM URB. L.J. 1 (2010).

⁶⁷ *A Right to a Lawyer? Momentum Grows*, 40 CLEARINGHOUSE REV. 163 (July–Aug. 2006); Paul Marvey, *Advocacy for a Right to Counsel: An Update*, 42 CLEARINGHOUSE REV. 644 (Mar.–Apr. 2008). See also Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697 (2006) [hereinafter Engler, *Shaping*]. See generally Symposium, *ABA Symposium on Access to Justice*, 37 FORDHAM URB. L.J. 1 (2010).

⁶⁸ For example, the Pa. Bar Ass'n passed a right to counsel resolution in Sept. 2007 and commissioned a task force to implement this policy.

B. Experimentation in the States

Many believe that the key to success in the civil Gideon movement lies with growing experimentation in the states. In the twenty-one intervening years between the Supreme Court's ruling in *Betts* and *Gideon*, most states adopted right to counsel statutes for serious criminal offenses, and by the time *Gideon* was argued twenty-two states agreed to sign on as amici curiae parties supporting Gideon's position. Only Florida and two other states, Alabama and North Carolina, advocated for the retention of the *Betts* rule. This clear change among the states signaled an important message that had a significant impact upon the Court. Similar developments over time on the civil side are also likely to have a persuasive impact, especially upon judges who believe the law should evolve slowly as the nation's views develop.⁶⁹

One of the more promising state court initiatives in the civil Gideon movement preceded the ABA's right to counsel resolution. In *Frase v. Barnhart*,⁷⁰ a Maryland child custody case, advocates asked their highest state court to decide whether the poor can hope to receive equal treatment as a matter of fundamental constitutional rights if they have no access to legal help. While the Maryland Court of Appeals decided the case on other grounds and did not reach the right of counsel issue, three of the seven justices would have found such a right under the Declaration of Rights of Maryland's state constitution.⁷¹ Not constrained by the Supreme Court's interpretation of the federal constitution in *Lassiter*, the

⁶⁹ For a discussion of state statutes guaranteeing a right to counsel in parental termination cases and other civil matters, see Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245 (2006); see generally Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter*, 14 Touro L. REV. 247 (1997).

⁷⁰ See generally *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003). See also John Nethercut, *Maryland's Strategy for Securing a Right to Counsel in Civil Cases: Frase v. Barnhart and Beyond*, 40 CLEARINGHOUSE REV. 238, 239 (2006) (concluding that challenges of *Lassiter* based on federal constitutional grounds were unlikely to succeed, but that a greater chance of success existed based upon state constitutional guarantees).

⁷¹ *Barnhart*, 840 A.2d at 126.

three Maryland justices acknowledged the historic path they were proposing by mandating a civil Gideon and the concerns it raised, but they responded with their own question: “What could be more important?”⁷²

While state litigation seeking to establish a right to counsel in selected areas of civil needs remains an important thrust of the right to counsel movement,⁷³ advocates for a civil right to counsel have also turned their attention to a broad range of other advocacy measures.⁷⁴ State and local bar associations have adopted similar resolutions to that of the ABA urging increased access to justice through the establishment of a right to counsel,⁷⁵ and they have recommended legislative change to amend state constitutions.⁷⁶ They have sponsored state and local legislation⁷⁷ and have

⁷² *Id.* at 103, 141.

⁷³ See, e.g., Office of Public Advocacy v. Alaska Court System, Randall Guy Gordanier, et al., No. S-12999 (Alaska 2008) (Alaska custody); *In re McBride*, 766 N.W.2d 857 (Mich. 2009) (parental rights termination); *Frase*, 840 A.2d 114; *Bellevue School Dist. v. E.S.*, 199 P.3d 1010 (Wash. Ct. App. 2009) (truancy). See also Millemann, *supra* note 46, at 748 (discussing state constitutional litigation challenges involving a right to counsel).

⁷⁴ See generally Paul Marvy & Laura Klein Abel, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 TOURO L. REV. 131 (2009).

⁷⁵ See, e.g., Alaska Bar Association (Sept. 11, 2008); Hawaii State Bar Association (Dec. 2007); Massachusetts Bar Association (May 23, 2007); Pennsylvania Bar Association (Nov. 2007); Philadelphia Bar Association (original co-sponsor of ABA resolution and additional resolutions, April 30, 2009).

⁷⁶ See California, Conference of Delegates of California Bar Association (Oct. 2006) (recommending legislation to amend state constitution in order to create a right to counsel where basic human needs are at stake).

⁷⁷ In October 2009, Governor Schwarzenegger of California signed the Sargent Shriver Civil Counsel Act providing funding for a two year pilot project to provide poor individuals a lawyer in certain high stakes cases (anticipated to include domestic violence claims, child custody cases, and housing matters). See Gary Toohey, *A Civil Right to Counsel: Inevitable or Unrealistic*, PRECEDENT, Winter 2010, at 23, available at <http://members.mobar.org/pdfs/precedent/feb10/civil.pdf> (citing *California Recognizes Civil Right to Counsel, Creates Pilot Program*, BRENNAN CENTER FOR JUSTICE, <http://www.brennancenter.org/content/elert/1selert1016091> (last visited Aug. 11, 2010)). See 2009 Cal. Legis. Serv. 457 (West 2009).

established state model statutes.⁷⁸ For example, Florida adopted a right to counsel statute in 2005 requiring legal representation for children determined to be eligible for special immigrant juvenile status so that they could apply for that status.⁷⁹ In New York, the State Judiciary recently established a program aimed at providing for a right to counsel for homeowners facing foreclosure. The program will be initially implemented in two New York counties and may eventually be put in place throughout the state.⁸⁰

Advocates have also fostered state justice commissions⁸¹ and bar association task forces.⁸² These have spurred pilot projects,⁸³

⁷⁸ See, for example, California's Cal. Comm'n on Access to Justice, *State Equal Justice Act*, BRENNAN CENTER FOR JUSTICE, www.brennancenter.org/page/-/d/download_file_38656.pdf (last visited Jan. 25, 2011), and Cal. Comm'n on Access to Justice, *State Basic Access Act*, BRENNAN CENTER FOR JUSTICE (Feb. 8, 2008), <http://www.brennancenter.org/page/-/Justice/State%20Basic%20Access%20Act%20Feb%202008.pdf>, developed by the Task Force of California Access to Justice Commission.

⁷⁹ See Marvy & Abel, *supra* note 74, at 131; 2005 Fla. Sess. Law. Serv. 245 (codified at Fla. Stat. Ann. § 39.5075(5)) (West 2010).

⁸⁰ See David Streitfeld, *New York Courts Vow Legal Aid in Housing*, N.Y. TIMES, Feb. 15, 2011, at B1. See also JONATHAN LIPPMAN, CHIEF JUDGE OF THE STATE OF NEW YORK, THE STATE OF THE JUDICIARY 2011: PURSUING JUSTICE 7–8 (Feb. 15, 2011), <http://www.courts.state.ny.us/admin/stateofjudiciary/SOJ-2011.pdf>.

⁸¹ See, e.g., MD. ACCESS TO JUSTICE COMM'N, INTERIM REPORT & RECOMMENDATIONS 1 (2009), available at <http://www.courts.state.md.us/mdatjc/pdfs/interimreport111009.pdf> (Maryland Access to Justice Commission was created in 2008); N.H. CITIZENS COMM'N ON THE STATE COURTS, REPORTS AND RECOMMENDATIONS 10 (2006) (studying the implementation of civil Gideon); see also Abel, *supra* note 24, at 534–35 (noting that a number of states have access to justice commissions with high ranking legislators and judges participating).

⁸² See, e.g., BOS. BAR ASS'N TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASS. (2008), available at http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf; MINN. BAR ASSOC., REPORT AND RECOMMENDATION TO THE MSBA REGARDING FUNDING FOR THE MSBA CIVIL GIDEON TASK FORCE (2008), available at <http://www.mnbar.org/committees/CivilGideon/MaterialsReports/AppropriationRequest2008.pdf>; PA. BAR ASSOC. ACCESS TO JUSTICE COMMITTEE, RESOLUTION TO COSPONSOR THE ABA'S RESOLUTIONS TO ADOPT THE PROPOSED ABA MODEL ACCESS ACT AND ABA

academic conferences,⁸⁴ and a significant body of published writings.⁸⁵ As individual efforts go forward, information and strategies are exchanged as part of a National Coalition for a Civil Right to Counsel which maintains a website and provides assistance to local efforts.⁸⁶ Finally, at its 2010 annual meeting, the ABA adopted a Model Access Act to provide a model statute for

BASIC PRINCIPLES OF A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS (2010), *available at* http://www.pabar.org/public/committees/lspublic/Resolutions/Resolution%20to%20Cosponsor%20ABA%20Model%20Act%20approved%20_2_.pdf; PHILA. BAR ASSOC., RESOLUTION ADOPTION AND SUPPORTING THE PRELIMINARY REPORT, FINDINGS AND RECOMMENDATIONS OF THE CHANCELLOR'S TASK FORCE ON CIVIL GIDEON (2009), *available at* http://www.philadelphiabar.org/page/ResNov1909_03?appNum=4.

⁸³ Massachusetts launched two pilot projects with the Boston Bar Foundation to explore the impact of full representation in eviction cases. *See Pilots*, CIVIL RIGHT TO COUNSEL, *available at* <http://www.civilrighttocounsel.org/advances/pilots/> (last visited Jan. 27, 2011).

⁸⁴ *See, e.g.*, Announcement, Edward V. Sparer Conference at the University of Pennsylvania Law School (March 28, 2006), *available at* <http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/civilgideonsymposiumflyer.pdf>. *See also* ABA, REPORT TO THE HOUSE OF DELEGATES, 5–7 (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/downloads/105_Revised_FINAL_Aug_2010.authcheckdam.pdf (discussing academic conferences at St. Thomas Law School and Touro Law School, and a Washington conference co-sponsored by Seattle University School of Law, University of Washington School of Law, and Gonzaga University School of Law); Press Release, Pa. Bar Ass'n, Civil Gideon Plenary Session April 10 (Apr. 8, 2008), *available at* <http://www.philadelphiabar.org/page/NewsItem?appNum=2&newsItemID=1000768>; Albert S. Dandridge, III, 'Outrage' Needed for Civil Gideon Success, PHILA. BAR REPORTER 4 (August 2010) (discussing the July 7, 1010 Chancellor's Forum on Civil Gideon).

⁸⁵ *See, e.g.*, Abel & Rettig, *supra* note 69, at 245; Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37 (2010) [hereinafter Engler, *Connecting*]; Engler, *Shaping*, *supra* note 67, at 697; Earl Johnson, Jr., *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. FOR SOC. JUST. 201 (2003).

⁸⁶ *See Get Involved*, NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL, http://www.civilrighttocounsel.org/about_the_coalition/get_involved/ (last visited Feb. 2, 2011).

states and localities to use in their varied efforts to establish and administer a civil right to counsel, accompanied by a report presenting basic principles of a right to counsel in civil legal proceedings.⁸⁷

Despite a growing number of court and legislative initiatives in states and localities, advocates have experienced difficulty in getting their hands around the most effective next steps that should be taken in pursuit of a civil *Gideon*. Should advocates focus their efforts on state courts in an attempt to get favorable rulings under state constitutional guarantees? Should they focus on lobbying state legislatures for legislation that mandates counsel at the public expense in compelling subject matters that most directly address essential needs? Should they turn to local legislatures where elected officials are most closely tied to basic human needs and may be particularly sensitive to local concerns?

Or, instead, should advocates engage in an aggressive public education campaign that informs citizens that a reading of their Miranda rights which they often hear on television crime shows, about having a lawyer appointed if one cannot be afforded, does not apply to even the most important of civil cases?⁸⁸ Alternatively, should advocates establish bar- or foundation-sponsored pilot projects that will integrate empirical studies to measure the success of their efforts and the true societal costs of not providing counsel when basic human needs are at stake? While there are no certain or easy answers to these questions and each locality must decide for itself which path best matches its own unique needs and concerns, there are lessons to be learned from the efforts of others to expand access to counsel in discrete civil matters.

⁸⁷ The ABA's Model Access Act for implementation of a civil right to counsel, MODEL ACCESS ACT § 104 (2010), and accompanying Basic Principles of a Right to Counsel in Civil Proceedings, MODEL ACCESS ACT § 105 (2010), were adopted at the ABA's annual meeting in August 5–10, 2010 in San Francisco. See *ABA Announcements*, ABA JOURNAL (Mar. 1, 2010), available at http://www.abajournal.com/magazine/article/aba_announcements2/.

⁸⁸ Interestingly, almost four-fifths incorrectly believe that the poor already have a right to legal aid in civil cases. Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1792 (2001).

III. CIVIL FORFEITURE REFORM AND A RIGHT TO COUNSEL FOR INDIGENT HOMEOWNERS

A. Introduction to Civil Forfeiture

The power of the government to seize contraband and obtain its forfeiture is a law enforcement tool as old as the nation.⁸⁹ In 1983, President Ronald Reagan declared war on drug racketeers in a State of the Union message and promoted strong federal forfeiture measures when he signed the Comprehensive Crime Control Act of 1984.⁹⁰ While civil and criminal forfeiture had been used to fight drug trafficking since the early 1970s, the 1984 legislation extended the reach of civil forfeiture to real estate that is used to facilitate drug transactions.

Civil forfeiture actions are *in rem* proceedings brought against the offending property on the theory that it is the property that makes possible the illegal conduct. As a result, the action is not brought against the property owner and the guilt or innocence of the property owner is not determinative of the outcome in a civil forfeiture action. The theory behind civil forfeiture is that the property has done wrong by facilitating illegal drug activity and that the government can eliminate illegal drug activity by taking the profit out of drug offenses. At the same time, the government's use of civil forfeiture as a drug-fighting tool can recoup drug enforcement costs and amass significant sums that are available for future law enforcement activities.

As law enforcement authorities gained financial success through civil forfeiture, they became more aggressive in their use of forfeiture proceedings. Many critics charged that harsh penalties, minimal safeguards, and relaxed procedures provided in civil forfeiture statutes trampled on the rights of ordinary citizens

⁸⁹ From the earliest days of the Republic, cargo ships were subject to federal forfeiture laws. See historical discussion of forfeiture in *Caldero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

⁹⁰ See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1776 (1984). See also ANDREW WHITFORD, *PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA: CONSTRUCTING THE WAR ON DRUGS* 55–63 (2009) (discussing President Reagan's zero tolerance policies on drug-related crimes).

who were often innocent themselves of any wrongdoing.⁹¹ Federal courts expressed growing concern over government forfeiture practices in the cases before them.⁹² The cry for forfeiture reform among interest groups and in the media mounted, leading to the introduction of reform legislation in Congress.⁹³ Representative Henry Hyde wrote a popular book, entitled *Forfeiting Our Property Rights, Is Your Property Safe from Seizure?*, in which he expressed concern that the war on drugs had become a “series of frontal attacks on basic American constitutional guarantees”⁹⁴

⁹¹ See Naftali Bendavid, *Asset Forfeiture, Once Sacrosanct, Now Appears Ripe for Reform*, LEGAL TIMES, July 5, 1993, at 1; Louis Rulli, *Access to Justice and Civil Forfeiture Reform: Providing Lawyers for the Poor and Recapturing Forfeited Assets for Impoverished Communities*, 17 YALE L. & POL’Y REV. 507, 512–13 (1998).

⁹² See, e.g., *United States v. James Daniel Good Real Property*, 510 U.S. 43, 82 n.1 (1993) (Thomas, J., dissenting); *United States v. \$31,990,982 in U.S. Currency*, F.2d 851, 856 (2d Cir. 1993); *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992); *United States v. One Parcel of Property*, 964 F.2d 814, 818 (8th Cir. 1992), *rev’d*, *Austin v. United States*, 509 U.S. 602 (1993); *United States v. \$506,231 in U.S. Currency*, 125 F.3d 442, 454 (7th Cir. 1997); *Jones v. U.S. Drug Enforcement Admin.*, 819 F. Supp. 698, 724 (M.D. Tenn. 1993).

⁹³ On June 15, 1993, Representative Henry Hyde introduced H.R. 2417, known as the Civil Forfeiture Act of 1993, the first initiative in a seven year battle to obtain reform that would ultimately culminate in CAFRA. See Civil Asset Forfeiture Reform Act, H.R. 2417, 103rd Cong. (1993). The Hyde Bill attempted to heighten the government’s burden of proof, provide for the appointment of counsel and eliminate cost bonds, among other things. See *id.* Congressman John Conyers Jr., a Democrat from Michigan, introduced H.R. 3347, known as the Asset Forfeiture Justice Act, Asset Forfeiture Justice Act, H.R. 3347, 103rd Cong. (1993), after holding hearings on forfeiture reform. See Department of Justice Asset Forfeiture Program: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations, 102d Cong., 2d Sess. 12–13 (1992). Conyers’ bill would have eliminated *in rem* forfeiture proceedings, requiring instead that the owner of property be convicted of a crime upon which the forfeiture is based before allowing the government to forfeit property. Civil Asset Forfeiture Reform Act, H.R. 2417, 103rd Cong. (1993).

⁹⁴ HENRY HYDE, *FORFEITING OUR PROPERTY RIGHTS, IS YOUR PROPERTY SAFE FROM SEIZURE?* 1 (Cato Institute 1995). Representative Hyde plainly voiced his opinion in his book: “My personal belief, which prompted my writing this book, is that there is an immediate need for restoration of the constitutional

In his book, he called for many reforms, including the appointment of counsel for indigents.⁹⁵

The demand for forfeiture reform recognized from the start that property owners needed greater access to counsel if property rights were to be adequately protected. Some began to argue that property owners were constitutionally entitled to counsel in civil forfeiture proceedings. Since many aspects of civil forfeiture closely resemble criminal proceedings, and civil forfeiture is acknowledged to be “quasi-criminal” and punitive in nature, advocates argued that property owners enjoyed a Sixth Amendment right to counsel in civil forfeiture cases and were entitled to have counsel appointed for them under the Criminal Justice Act.⁹⁶ However, the Supreme Court has not deemed forfeiture actions to be criminal proceedings for the purposes of entitlement to counsel,⁹⁷ leaving to lower federal courts the responsibility of deciding the constitutional dimensions of this issue in individual cases.

B. Court Efforts to Obtain a Right to Counsel

Thus far, efforts through the courts to establish a right to counsel in civil forfeiture proceedings have achieved momentary victories, but not lasting success. In *United States v. Bowman*,⁹⁸ a

principles that are debased by the current application of asset forfeiture laws.” *Id.* at 4.

⁹⁵ *Id.* at 81 (proposing that anyone financially unable to obtain representation in a federal civil forfeiture matter be appointed counsel, paid with funds from the Department of Justice Assets Forfeiture Fund).

⁹⁶ *See, e.g.,* *United States v. 1604 Oceola*, 803 F. Supp 1194 (N.D. Tex. 1992). The Criminal Justice Act authorizes payment for appointed counsel on behalf of financially eligible individuals who have a Sixth Amendment right to counsel. *See* Criminal Justice Act, 18 U.S.C.A. § 3006A(a)(1)(H) (West 2010).

⁹⁷ *See* *Austin v. United States*, 509 U.S. 602, 608 n.4 (1993) (holding that some constitutional protections apply to civil forfeiture, but unless a civil forfeiture proceeding is so punitive that it must reasonably be considered criminal, counsel is not required to be appointed). *United States v. 7108 West Grand Ave.*, Chicago, Ill., 15 F.3d 632, 635 (7th Cir. 1994).

⁹⁸ *United States v. Bowman*, 277 F. Supp. 2d 1239, 1244 (N.D. Ala. 2003), *vacated*, No. CR-03-C-0056-E, 2003 WL 23272667 (N.D. Ala. 2003).

district court in Alaska held that the Sixth Amendment guaranteed a lawyer to a claimant in a civil forfeiture proceeding. Unwilling to “exalt form over substance,” the Alaska court rejected the government’s argument that the Sixth Amendment’s right to counsel does not attach because forfeiture actions, being *in rem* rather than *in personam*, are not adversarial proceedings. Ultimately, however, the order and opinion in the case were vacated based upon plea arguments entered in the case.⁹⁹

The legal claim that the Sixth Amendment provides a right to counsel in civil forfeiture proceedings has been rejected by federal appellate courts in the Second,¹⁰⁰ Sixth,¹⁰¹ Seventh,¹⁰² Ninth,¹⁰³ Tenth,¹⁰⁴ and Eleventh¹⁰⁵ circuits on the basis that civil forfeiture statutes authorize the forfeiture of property and not the imprisonment of the property owner.¹⁰⁶

Advocates seeking to establish a right to counsel in civil forfeiture proceedings in state courts have not fared any better. In a case of first impression, a Pennsylvania intermediate appellate court held that an indigent property owner was entitled to counsel in civil forfeiture actions under the due process clause of the Fourteenth Amendment.¹⁰⁷ The court acknowledged that forfeiture

⁹⁹ See *United States v. Bowman*, No. CR-03-C-0056-E, 2003 WL 23272667 (N.D. Ala. 2003).

¹⁰⁰ See *United States v. 87 Blackheath Road*, 201 F.3d 98 (2d Cir. 2000).

¹⁰¹ *United States v. Mitchell Ave.*, 149 F.3d 472, 475 (6th Cir. 1998).

¹⁰² *United States v. 7108 W. Grand Ave.*, 15 F.3d 632 (7th Cir.), *cert. denied*, 512 U.S. 1212 (1994).

¹⁰³ *Acosta v. United States*, 130 Fed. Appx. 881 (9th Cir. 2005); *United States v. \$292,288.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995) (finding there is no Sixth Amendment right to counsel because civil forfeiture statutes authorize the forfeiture of property and not the imprisonment of the property owner).

¹⁰⁴ *United States v. Deninno*, 103 F.3d 82, 86 (10th Cir. 1996).

¹⁰⁵ *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1311–12 (11th Cir. 1999), *cert. denied*, 528 U.S. 1083 (2000).

¹⁰⁶ See also *United States v. All Funds on Deposit in any and all Accounts*, 2009 WL 2424337 (E.D.N.Y. 2009) (holding that a property owner is not entitled to an appointment of counsel because the Sixth Amendment’s protections are confined to criminal prosecutions).

¹⁰⁷ *Commonwealth of Pennsylvania v. \$9,847.00 U.S. Currency*, 637 A.2d

law is a “complicated and abstruse” field that poses substantial burdens for a pro se litigant.¹⁰⁸ Influenced by the U.S. Supreme Court’s holding that the Eighth Amendment’s excessive fines clause applied to civil forfeiture proceedings,¹⁰⁹ Pennsylvania’s Commonwealth Court concluded that appointment of counsel was constitutionally required under the Fourteenth Amendment’s due process clause in order to protect an indigent property owner from the likelihood of an erroneous deprivation of his property.

This decision was short-lived. Three years later, the Pennsylvania Supreme Court reversed the Commonwealth Court and held that the due process clause of the Fourteenth Amendment did not require the appointment of counsel for an indigent property owner.¹¹⁰ Applying the Supreme Court’s balancing test announced in *Mathews v. Eldridge*, the Pennsylvania Supreme Court found the burden to government of providing counsel to a class of property claimants to be substantial and the risk of erroneous deprivation to property owners minimal. Without a liberty interest at risk, the Court held that a proper application of *Mathews* weighed against a property claimant’s entitlement to counsel in civil forfeiture actions.¹¹¹ Other state courts have similarly declined to find a right to counsel in civil forfeiture proceedings.¹¹²

C. Legislative Reform

As judicial efforts to obtain a constitutional right to counsel in

736, 741 (Pa. Commw. Ct. 1994), *rev’d*, 704 A.2d 612 (Pa. 1997).

¹⁰⁸ \$9,847.00 U.S. Currency, 637 A.2d at 743.

¹⁰⁹ *Austin v. United States*, 509 U.S. 602 (1993).

¹¹⁰ *Commonwealth v. \$9,847.00 U.S. Currency*, 704 A.2d 612 (Pa. 1997).

¹¹¹ The Pennsylvania Supreme Court did not consider whether the Pennsylvania Constitution might require counsel under circumstances not required by the U.S. Constitution. *Id.* at 617.

¹¹² *See, e.g., State v. \$1,010.00 in American Currency*, 722 N.W. 2d 92 (SD 2009) (holding no Sixth Amendment right attached because the action was not a criminal proceeding, and rejecting the argument that state law required the appointment of counsel on the basis of equity considerations). *See also State v. Halvorson*, 724 N.W. 2d 703 (Table) (Wis. App. 2006); *State v. Hermann*, 719 N.W. 2d 800 (Table) (Wis. App. 2006); *In re Property Seized from Behmer*, 720 N.W. 2d 191 (Table), 2006 WL 1279318 (Iowa Ct. App. 2006).

civil forfeiture actions proved largely unsuccessful, advocacy shifted to the legislature. With a growing number of publicized incidents of forfeiture abuse and increasing concern that innocent owners forfeited property without sufficient legal protection,¹¹³ Congress embarked on a seven year effort to reform the nation's civil forfeiture laws. These legislative efforts began in the House of Representatives and ultimately obtained consensus in the Senate, culminating in the passage of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA").

The new legislation enacted important safeguards to achieve procedural fairness and enable average citizens to contest forfeiture claims brought against their property. The reform statute created a uniform innocent owner defense for all federal civil forfeiture statutes and heightened the government's burden required to prove that private property was subject to forfeiture.¹¹⁴ Representative Henry Hyde, a primary architect of CAFRA's reforms, spoke proudly of the Act's accomplishments: "It returns civil asset forfeiture to the ranks of respected law-enforcement tools that can be used without risk to the civil liberties and property rights of American citizens. We are all better off that this is so."¹¹⁵

While CAFRA included many important civil legal protections for ordinary citizens, the Act's expanded right to counsel is considered by some to be among its most important reforms.¹¹⁶ In proposing legislative reform, the House Judiciary Committee's report recommended "eight core reforms"¹¹⁷ to civil forfeiture law, of which the appointment of counsel was listed second only to reform of the burden of proof.¹¹⁸ Acknowledging that there is no

¹¹³ See HYDE, *supra* note 94, at 5–6.

¹¹⁴ See Civil Asset Forfeiture Reform Act, 18 U.S.C.A. § 983(c) (West 2010). Under the new Act, the government is now required to meet a preponderance of the evidence standard in order to demonstrate the forfeitability of property. *Id.*

¹¹⁵ See Stephen Labaton, *Congress Raises Burden of Proof on Asset Seizures*, N.Y. TIMES, April 12, 2000, at A1.

¹¹⁶ See 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES P 1.02[2]-[3] (Matthew Binder 2010).

¹¹⁷ H.R. REP. NO. 106-192, at 11 (1999).

¹¹⁸ The eight core reforms proposed in H.R. 1658 are outlined in Report

Sixth Amendment right to appointed counsel for indigents in civil forfeiture cases, the report nonetheless expresses the Committee's conclusion that civil forfeiture proceedings are "so punitive in nature that appointed counsel should be made available for those who are indigent, or made indigent by seizure in appropriate circumstances."¹¹⁹

The Hyde-Conyers Civil Asset Forfeiture Reform Act (House Bill 1658) passed the House of Representatives in 1999 by an overwhelming vote of 375 to 48. As negotiations continued with the Department of Justice, Senators Hatch and Leahy introduced Senate Bill 1931. The Senate bill rejected the broader grant of authority for appointed counsel found in the House bill, and instead provided for the appointment of counsel only where an indigent's primary residence was the subject of the proceeding. Negotiations with Senators Sessions and Schumer led to agreement on thirty substantive changes and the addition of new sections giving additional authority to law enforcement to utilize criminal forfeiture powers. These new additions included the provision of counsel for indigent homeowners seeking to defend against civil forfeiture of their primary residences, utilizing the Legal Services Corporation as the conduit for the implementation of a right to counsel. Promising "to do the right thing on this important issue of fairness," the Senate bill included a "right to counsel" provision for a limited class of civil asset forfeiture proceedings.¹²⁰ This provision was adopted in the final text of the bill that was ultimately signed into law by President Clinton in April of 2000.¹²¹

106-192 as the following: Burden of proof, appointment of counsel, innocent owner defense, return of property upon showing of hardship, compensation for damage to property while in the government's possession, elimination of cost bond, adequate time to contest forfeiture, and interest. *Id.* at 11-19.

¹¹⁹ *Id.* at 14. While the Judiciary Committee reported H.R. 1658 favorably to the House of Representatives by a vote of 27-3, the dissenting view expressed in the Committee's report took issue with the expanded provision for appointment of counsel, believing that the bill lacked substantial safeguards to protect against abuse of this provision. The dissenting view also noted that successful challenges to forfeiture were already eligible to recover attorneys' fees under the Equal Access to Justice Act. *Id.* at 20, 34.

¹²⁰ 146 CONG. REC. 3656 (2000).

¹²¹ See Civil Asset Forfeiture Reform Act, 18 U.S.C.A. § 983(b)(2)(A)

The text of this provision set forth the parameters of this right:

If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the property subject to forfeiture is real property that is being used by the person as a primary residence, the court, at the request of the person, shall insure that the person is represented by an attorney for the Legal Services Corporation with respect to the claim.¹²²

The right to counsel provided for attorney compensation at levels equivalent to that provided for other court-appointed representation,¹²³ and required that the Legal Services Corporation submit statements of reasonable fees and costs during the course of the representation for court review.¹²⁴ At its core, the newly created right was intended to protect the family home against erroneous deprivation under harsh civil forfeiture laws.¹²⁵ Significantly, protection of the family home received enthusiastic support from Congress, reflecting deeply-held views that private homeownership represents a cornerstone of the American dream.¹²⁶

(West 2010).

¹²² *Id.*

¹²³ *See id.* § 983(b)(3).

¹²⁴ *Id.* § 983(b)(2)(B)(i).

¹²⁵ The adverse impact and severe consequences upon an entire family caused by the forfeiting of a primary residence was clearly on the minds of key senators as compromises were reached leading to this provision. For example, Senator Leahy noted that Vermont state law does not permit the forfeiture of real property that is used as the primary residence of a person involved in the violation and a member or members of that person's family. *See* 146 CONG. REC. 3655 (2000) (statement of Sen. Leahy) (citing 18 V.S.A. § 4241(a)(5)).

¹²⁶ *See* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1095 (2009) (describing theoretical notions of the home's reign over property law and its connection to one's personhood). *See also* JIM CULLEN, *THE AMERICAN DREAM* 136 (Oxford Univ. Press 2003) (noting that no American dream has broader appeal than that of owning a home). The premium placed on protecting the family home from a wrongful taking may also be seen in current efforts to provide counsel for

CAFRA expands access to counsel in three important ways.¹²⁷ First, it authorizes federal courts to appoint counsel for indigent property owners who are accused of a crime related to the subject of the civil forfeiture proceeding and are represented by court-appointed counsel in the underlying criminal case. In these instances, a court is encouraged, though not required, to appoint counsel for a property owner where the individual has standing to contest the civil forfeiture and asserts a claim in good faith. Lawyers who are appointed to provide representation are compensated at levels authorized by the Criminal Justice Act for court-appointed counsel in criminal proceedings.¹²⁸

Second, upon request of an indigent property owner, the act requires a court to appoint counsel where a primary residence is the subject of civil forfeiture proceedings.¹²⁹ In these instances, the court appoints the Legal Services Corporation and, again, the lawyer's services are compensated at rates equivalent to that set for court-appointed counsel under the Criminal Justice Act.¹³⁰

Finally, CAFRA provides a financial incentive to expand access to legal representation by authorizing an award of attorney's fees to a property owner who substantially prevails against the

homeowners in foreclosure proceedings. *See, e.g., supra* note 80.

¹²⁷ In addition to expanding access to counsel, CAFRA eliminated cost bonds which, until their removal, presented onerous obstacles to challenging government seizures of private property. Civil Asset Forfeiture Reform Act, 19 U.S.C.A. § 1608 (West 2010).

¹²⁸ 18 U.S.C. § 983(b)(1)(A) provides that:

if a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the person is represented by counsel appointed under section 3006A of this title in connection with a related criminal case, the court may authorize counsel to represent that person with respect to the claim.

Civil Asset Forfeiture Reform Act, 18 U.S.C.A. § 983(b)(1)(A) (West 2010). 18 U.S.C. § 983(b)(1)(B) instructs trial courts to take into account "the person's standing to contest the forfeiture," and "whether the claim appears to be made in good faith" when determining whether to authorize an appointment of counsel. Civil Asset Forfeiture Reform Act, 18 U.S.C.A. § 983(b)(1)(B) (West 2010).

¹²⁹ *Id.* § 983(b)(2)(A).

¹³⁰ *Id.* § 983(b)(2)(A)–(B).

United States in a civil forfeiture proceeding. While the Equal Access to Justice Act (“EAJA”) had already authorized attorney’s fees against the U.S. government under limited circumstances, CAFRA’s grant of authority to a claimant who substantially prevails in civil forfeiture litigation (and is not convicted of a crime related to the subject property) expands the potential for recovery of attorney’s fees against the federal government.¹³¹

IV. FIVE LESSONS LEARNED FROM CAFRA’S STATUTORY RIGHT TO COUNSEL

The successful legislative effort to expand access to counsel for property owners in federal civil forfeiture proceedings holds valuable lessons for the civil Gideon movement. The movement to establish a right to counsel proceeded simultaneously in both judicial and legislative forums, but advocates soon found that judicial efforts largely failed while legislative initiatives offered greater promise of success. The balance of this Article identifies and discusses five important lessons that may be drawn from this successful reform effort, with special focus on CAFRA’s achievement of a right to counsel for indigent homeowners whose primary residences are the subject of federal civil forfeiture proceedings. Hopefully, these lessons offer helpful guidance to advocates fighting to secure a right to counsel at the public expense for indigent litigants in a broad range of civil proceedings.

A. Lesson One: Narrative stories of failure which document how lives are shattered and private property seized from ordinary citizens in civil proceedings, without the safeguard of having a lawyer present, provide a powerful catalyst for legislative change.

A powerful catalyst for legislative change is often rooted in compelling narrative stories recounted by ordinary citizens describing incidents of abuse, injustice, and official overreaching.

¹³¹ See Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202, § 4 (2000).

“Narratives make a point and persuade people because of the lifelikeness, which is in turn based on a person’s knowledge about how things really happen in the world” (internal quotations omitted).¹³² Lawyers have long relied upon storytelling as a valuable advocacy tool because they recognize that emotion persuades.¹³³ For this reason, storytelling is routinely used at trial in appeals to juries and also in negotiations,¹³⁴ and it is strategically used in legal advocacy and brief writing addressed to the highest courts.¹³⁵

Storytelling is especially effective when it depicts characters that draw listeners into a narrative that facilitates empathy and understanding.¹³⁶ It is widely acknowledged that “[s]tories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.”¹³⁷ As a result, legal narrative is increasingly taught in law schools in appreciation

¹³² Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) are as Important as IRAC*, 25 T.M. COOLEY L. REV. 267, 273–74 (2008).

¹³³ *Id.* at 276.

¹³⁴ See Stacey Caplow, *Putting the “I” in Wr*t*ng: Drafting an A/Effective Personal Statement to Tell a Winning Refugee Story*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 249, 261 n.41, 42 (2008).

¹³⁵ While trial instruction materials routinely tout the power of storytelling in convincing a trial judge or jury of the wisdom of the lawyer’s legal position, narrative persuasion is actually used effectively throughout all lawyering and even in more formal and legalistic means of advocacy, such as appellate briefs and oral argument before the highest courts. See, e.g., Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 709–16 (1994) (discussing storytelling that was used by advocates in their brief in *Miranda v. Arizona* to convince the high Court that the interrogation process was unfair). See also Philip N. Meyer, *Are the Characters in a Death Penalty Brief Like the Characters in a Movie?*, 32 VT. L. REV. 877 n.4 (2008) (citing Anthony G. Amsterdam’s list of limits in using narrative persuasion in cost-conviction litigation).

¹³⁶ Meyer, *supra* note 135, at 1.

¹³⁷ Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for the Narrative*, 87 MICH. L. REV. 2411, 2413 (1989).

of the notion that storytelling affects what we come to regard as truth and reality, and serves as an effective means of motivating us to adopt a proposed remedy to a legal problem.¹³⁸ At its core, narrative stories are “enabling and empowering and, indeed, fundamental to how we fashion our beliefs and how we act upon them.”¹³⁹ In short, narratives are an important and effective component of advocacy in all of its forms.

Storytelling has long been at the heart of successful legislative initiatives. Narrative stories resonate deeply with the public (and their elected officials) when the lives of ordinary people are seriously injured by governmental action which violates widely held notions of fairness. Storytelling can establish and perpetuate a particular view of reality,¹⁴⁰ and listening to narrative stories allows one to see the world through another’s eyes.¹⁴¹ Proponents of civil asset forfeiture reform understood this basic tool and used it effectively in their efforts to achieve systemic change.

The highly rated television news show *60 Minutes* is a national forum for effective storytelling that has often prompted legislative action. In 1992, the show featured the story of Willie Jones, an African-American landscaper who was stopped at the Nashville airport after paying cash for his airline ticket.¹⁴² While detained at

¹³⁸ See Rhonda V. Magee, *Symposium: Deconstructing Race: When Reasonable Minds Differ Toward an Integral Critical Approach to Thinking, Talking, Writing, and Teaching About Race*, 43 U.S.F. L. REV. 259 (2008); James R. Elkins, *Popular Culture, Legal Films, and Legal Film Critics*, 40 LOY. L.A. L. REV. 745, 758 (2007). See also Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 686–867 (1994).

¹³⁹ Philip N. Meyer, *Teaching Writing and Teaching Doctrine: A Symbiotic Relationship? Vignettes from a Narrative Primer*, 12 LEGAL WRITING: J. LEGAL WRITING INST. 229, 230 (2006) (discussing why it is important to teach narrative persuasion and providing a brief summary of references to scholarship on legal storytelling and narrative jurisprudence).

¹⁴⁰ See Delgado, *supra* note 137, at 2422. See also Bendavid, *supra* note 91, at 1.

¹⁴¹ Delgado, *supra* note 137, at 2439.

¹⁴² See *60 Minutes: You’re Under Arrest* (CBS television broadcast, Apr. 5, 1992). See also Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary, 104th Cong. 270–271 (1996) (statement of Mark Kappelhoff, Legislative Counsel, American Civil Liberties Union).

the ticket counter, Mr. Jones was told that no one had ever paid cash for a ticket.¹⁴³ Following detention, law enforcement authorities seized \$9,000 in cash from his person because, according to police, he matched the profile of a drug courier.¹⁴⁴ Although Mr. Jones explained that he was carrying this sum of cash to buy landscaping materials for his business from a nursery in Texas that required payment by cash, law enforcement authorities were unpersuaded. In testimony before the House Judiciary Committee, Mr. Jones described what happened to him after being stopped by police at the airport:

I was questioned about had I ever been involved in any drug-related activity, and I told them, no, I had not. So they told me I might as well tell the truth because they were going to find out anyway. So they ran it through on the computer after I presented my driver's license to them, which everything was—I had—it was all in my name. And he ran it through the computer, and one officer told the other one, saying, he is clean. But instead, they said that the dogs hit on the money. So they told me at that time they was going to confiscate the money.¹⁴⁵

The agents contended that police dogs had identified traces of drugs on the money, justifying the seizure of Jones' cash. Mr. Jones was then released by the agents and never charged with a criminal offense. He was told that he could continue on to Texas if he wanted since his plane had not yet departed. Of course, as noted by Representative Henry Hyde in a legislative hearing, Mr. Jones had no reason to continue on to Texas since his money was gone and he could not buy the shrubs that his cash was intended to purchase.¹⁴⁶

Federal civil forfeiture law required Mr. Jones to post a 10 percent cost bond in order to legally challenge the seizure of his property. However, he was unable to afford this cost.¹⁴⁷ He later

¹⁴³ H.R. REP. NO. 106-192, at 6 (1999).

¹⁴⁴ *Id.* See also 60 Minutes, *supra* note 142.

¹⁴⁵ H.R. REP. NO. 106-192, at 6–7.

¹⁴⁶ *Id.* at 7.

¹⁴⁷ *Id.*

filed a civil action in federal court alleging that he was the victim of an unconstitutional search and seizure.¹⁴⁸ The court agreed, and his cash was ultimately returned to him. In ruling for Mr. Jones, a federal judge sounded a strong note of concern, stating “that the statutory [forfeiture] scheme as well as its administrative implementation provide[d] substantial opportunity for abuse and potentiality for corruption.”¹⁴⁹

The Willie Jones story highlighted the burdensome obstacles that ordinary citizens faced in challenging the government’s seizure of their property. In addition, it raised serious issues of governmental overreaching seemingly authorized by civil forfeiture law. In Mr. Jones’ case, inadequate legal protections also raised troubling questions as to whether civil forfeiture law was contributing to racial profiling by law enforcement authorities.¹⁵⁰ While the court did not find sufficient evidence of racial motivation in the Jones’ case, race has played a part in other drug seizure investigations.¹⁵¹

Congress heard compelling stories in legislative hearings from many victims of civil forfeiture law. In Vermont, civil forfeiture practices garnered considerable legislative and media attention when the parents of a local Vermont family were accused and convicted of federal drug violations. The Mannings and their four children lived on a farm owned by the parents. The federal government brought an action to forfeit the family home based upon the alleged illegal acts of the parents. If the action proved successful, a forfeiture would have deprived the innocent children of their family home. Senator Jeffords, among others, interceded and convinced the U.S. attorney to accept a beneficial trust for the children that would allow them to continue to live on the farm even if the property was confiscated in the forfeiture action.

The Manning children were fortunate to have influential elected officials to speak on their behalf. Many others, however, are not so fortunate, especially when they lack the financial means

¹⁴⁸ Jones v. United States Drug Enforcement Admin., 819 F. Supp. 698, 724 (M.D. Tenn. 1993).

¹⁴⁹ *Id.*

¹⁵⁰ See H. R. REP. NO. 105-358, pt. 1, at 23–26.

¹⁵¹ Jones, 819 F. Supp. at 723.

to hire an attorney to protect their interests. The experience of a constituent family compelled Vermont's Senator James Jeffords to introduce a civil asset forfeiture reform act¹⁵² designed to prevent the "devastating psychological impact that the confiscation of homes can have on the innocent children who live in them."¹⁵³ Senator Jeffords noted that too often property is seized from individuals who are never charged with or convicted of a crime. He expressed special concern for individuals who face difficult burdens when the government's actions take the form of a civil proceeding which lacks the protections inherent in a criminal case.¹⁵⁴ Senator Jeffords recognized that property owners need the assistance of counsel under these circumstances and he therefore sponsored a provision in CAFRA which authorized the appointment of counsel for a person who is financially unable to obtain representation. Under this proposal, an appointed lawyer would be compensated in an amount equal to that provided to appointed counsel in criminal proceedings.¹⁵⁵

The adage attributed to former House Speaker Tip O'Neal that all politics is local¹⁵⁶ proved true in Vermont and played an

¹⁵² Civil Asset Forfeiture Reform Act, S. 1655, 103rd Cong. (1993), was introduced by Senator Jeffords of Vermont in the Senate in 1993. *See S. 1655: Civil Asset Reform Act*, GOVTRACK, <http://www.govtrack.us/congress/bill.xpd?bill=s103-1655> (last visited Feb. 4, 2011). After being referred to the Senate Judiciary Committee and then to the Subcommittee on Courts and Administrative Practice the bill was never reported out of committee. *See Committee Assignments*, GOVTRACK, <http://www.govtrack.us/congress/bill.xpd?bill=s103-1655&tab=committees> (last visited Feb. 4, 2011).

¹⁵³ 139 CONG. REC. S1,655 (daily ed. Nov. 10, 1993) (statement of Sen. James Jeffords), 139 CONG. REC. S 15601, at *S1,655 (LEXIS).

¹⁵⁴ Senator Jeffords noted that "as much as 80 percent of the people whose property is seized are never charged with, let alone convicted of, a crime." *Id.*

¹⁵⁵ Sec. 608(b)(1) and (2) of the Senate bill provided for compensation to be funded by the Justice Department's Assets Forfeiture Fund established under section 524 of title 28, United States Code, and compensated at rates in accordance with section 3006A of title 18, United States Code, with maximum compensation at \$3500 per attorney for representation at the district court level and \$2500 per attorney for appellate court representation, similar to maximums set in federal felony cases. *Id.*

¹⁵⁶ THOMAS P. "TIP" O'NEILL, JR. WITH WILLIAM NOVAK, *MAN OF THE HOUSE* 26 (1987).

important role in the introduction of legislation intended to remedy abuses of governmental authority back home.¹⁵⁷ Senator Patrick Leahy of Vermont put it this way:

I am well aware from incidents in Vermont about how aggressive use by Federal and State law enforcement officials of civil asset forfeiture laws can appear unfair and excessive, and thereby fuel public distrust of the government in general and law enforcement in particular.¹⁵⁸

Compelling stories that prompt legislative action often come from the experiences of ordinary families in an elected official's home district. According to House Judiciary Committee testimony, Margaret L. Cutkomp was seventy-five years old and a hard-working, frugal woman who chose to save rather than spend her savings.¹⁵⁹ She never took a vacation or missed a day's work in the business.¹⁶⁰ By age seventy, Margaret Cutkomp had acquired ownership of a couple of residential rental properties and had saved a total of around \$70,000 which she kept in a floor safe located in her house.¹⁶¹ She was a holdover from the Great Depression and grew up distrusting banks.¹⁶²

In December 1989, federal law enforcement authorities seized Margaret Cutkomp's cash savings and three months later her home and two rental properties which she owned.¹⁶³ The government never charged Margaret Cutkomp with a crime.¹⁶⁴ Apparently, her

¹⁵⁷ See Albert Hunt, *Rep. O'Neill, House Democrats' Choice, Looms as Powerful and Assertive Speaker*, WALL ST. J., Dec. 6, 1976.

¹⁵⁸ 146 CONG. REC. 3,655 (2000) (statement of Sen. Patrick Leahy).

¹⁵⁹ Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary, 104th Cong. 21 (1996) (statement of King Cutkomp). See *USA v. Three Parcels of Real Estate, et al.*, Property Claimant Margaret L. Cutkomp, Civil Action No. 89-4131 (dismissing forfeiture action by reason of settlement entered on Dec. 13, 1990 (pleading no. 52), with stipulated final judgment of forfeiture filed Jan. 4, 1991 (pleading no. 53)) for additional information.

¹⁶⁰ Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary, 104th Cong. 21 (1996) (statement of King Cutkomp).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

only wrongful act was living next door to one of her adult sons, who purportedly sold marijuana from his home. In legislative testimony, Margaret Cutkomp's other son, King Cutkomp, described how his mother's safe was rusted shut and had to be drilled open, a fact very much at odds with the government's theory that the cash stored in her home was the product of the alleged illegal activity.¹⁶⁵ Indeed, the bills in the safe were mostly old bills from the 1960s and 1970s that showed their age by being covered in mold and mildew.¹⁶⁶

Nonetheless, Margaret Cutkomp was told by government authorities that she had one-half hour to pack up and get out of her house.¹⁶⁷ While an attorney called by King Cutkomp was able to stop his mother's eviction from her home, King Cutkomp ultimately determined that it would cost more to go to trial and fight the government than his mother's seized property was actually worth.¹⁶⁸ A settlement with the government allowed Margaret Cutkomp to keep some of her life-long savings but, according to King Cutkomp's testimony, the government took most of it and along with it his mother's "dignity and love for our government."¹⁶⁹ King ultimately joined reform efforts and urged Congress to re-write civil forfeiture laws to include "proof, fairness and compassion."¹⁷⁰ He testified that civil forfeiture law was "ruining people's lives" and he called it "a national disgrace."¹⁷¹

Proponents of forfeiture reform recognized that legal arguments and appeals to noble principles alone would not bring about needed legislative change. They understood that they needed to show in plain terms how civil forfeiture practices victimized ordinary citizens, offended basic principles of fairness, and seized cherished belongings often without any lawyer to help a property owner. Legislative success depended on being able to bring these tragic stories to light, especially as they affected ordinary citizens

¹⁶⁵ *See id.* at 22.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 22–23.

¹⁶⁹ *Id.* at 23.

¹⁷⁰ *Id.* at 24.

¹⁷¹ *Id.*

who were absolutely innocent of any wrongdoing. As the call for forfeiture reform drew increasing support, Senator Leahy proclaimed that it was “time for Congress to catch up with the American people and the courts and do the right thing on this important issue of fairness.”¹⁷²

To remedy forfeiture abuse, Congress understood that it needed to address the fact that so many property owners did not have counsel and often surrendered their private property rather than oppose the government. As a result, access to counsel became one of the key reforms in overhauling the nation’s civil forfeiture laws. Congress appeared particularly disturbed by the fact that individuals accused of crimes had greater access to counsel than law-abiding property owners who were not charged with any criminal wrongdoing.¹⁷³ To restore fairness to forfeiture law, reform legislation needed to increase access to counsel.¹⁷⁴

In recent years, advocates seeking greater funding for civil legal aid and promoting higher levels of pro bono participation from the private bar have generally appealed to higher callings of the legal profession and to noble objectives of due process of law. Quite understandably, the access to justice movement has touted stories of success which lawyers for the poor have achieved when they represent indigent clients. These stories are generally uplifting: they describe a home saved, a public benefit obtained, or personal safety restored. The stories document happy endings in courts and governmental agencies, made possible because the poor had a trained advocate at their side. The stories are frequently recounted in bar association magazines or legal newspapers, with the goal of boosting lawyer volunteerism and promoting increased funding from public and private sources. In short, success stories make lawyers feel good and help to secure needed participation

¹⁷² 146 CONG. REC. S1762 (daily ed. Mar. 27, 2000) (statement of Sen. Patrick Leahy).

¹⁷³ Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 106th Cong. 85 (1999) (Samuel Buffone, Co-Chair of the Forfeiture Abuse Task Force, National Association of Criminal Defense Lawyers).

¹⁷⁴ See 145 CONG. REC. 14,116 (1999) (Statement of Rep. Deborah Pryce).

and support from the bar and judiciary.

However, feel good stories are not likely to be the stories that will ultimately mold public opinion on the need for a lawyer at the public expense in a civil case. Civil forfeiture reform teaches us that the narrative stories which are more likely to have a strong impact on public opinion and elected officials are those that describe tragic consequences that befall ordinary families when they do not have a lawyer to protect their most precious interests. Rather than success stories, these are stories of *failure*. These are the stories of what happens to families, low-income and middle-income, who lose their homes; elderly citizens who are denied critical medical care when they need it most; and parents who lose custody of their children not because the facts or the law are against them, but rather because they simply do not have a lawyer to give them a shot at a fair hearing in our civil justice system. These are the stories in which justice is meted out not based upon a proper application of the law, but instead based upon harsh realities of default in which status and wealth are deciding factors. These are the stories that must be told in public forums, on television, in social media, in general circulation newspapers, and ultimately in the halls of Congress.

The first lesson of civil forfeiture reform is that for legislative change to occur, the public and their elected officials must be confronted with the tragic stories of ordinary lives shattered in our civil justice system, not based upon what is right or fair, but rather because they did not have a lawyer at their side to protect their most fundamental interests.

B. Lesson Two: Strong cautionary statements about inadequate legal protections, voiced by influential courts, and bolstered by academic and popular criticism and supporting empirical data, provide a firm foundation for civil justice reforms.

The narrative stories of citizens victimized by civil forfeiture abuse painted a powerful picture of the problem, but might not have resulted in legislative change without the official imprimatur of influential courts and the detailed writings of academics

describing how civil forfeiture procedures were failing ordinary citizens. In other words, forfeiture reform hinged not only on the telling of narrative stories; these experiences needed to be validated by credible and respected institutions wielding power in our society.

In civil forfeiture reform, official validation of legal deficiencies and systemic unfairness took many forms. Strong statements appearing in the text of decisions by appellate courts in the cases before them provided a powerful and urgent message from conservative institutions of the need for substantial change. Under some circumstances, judicially-crafted language appearing in court decisions can motivate and influence the expectations of social actors. Unquestionably, court victories affect legal discourse and embolden action, while enhancing negotiation postures and mobilizing social movements.¹⁷⁵ Legal action has often been the catalyst for change needed to remedy social injustice.¹⁷⁶ Lawyers are often good social change agents because of their “[l]eadership qualities, forensic ability, talent for reasoning, and knowledge of the legal system,” all of which aid in generating change and nourishing social movements to succeed.¹⁷⁷

In civil forfeiture cases before them, federal judges expressed deep concern that the legal framework did not adequately protect the legitimate interests of property owners.¹⁷⁸ For example, in *United States v. All Assets of Statewide Auto Parts, Inc.*, the Second Circuit stated, “We continue to be enormously troubled by the government’s increasing and virtually unchecked use of the

¹⁷⁵ See Shannon Roesler, *Permutations of Judicial Power: The New Constitutionalism and the Expansion of Judicial Authority*, 32 LAW & SOC. INQUIRY 545, 571–74 (2007).

¹⁷⁶ See Hannah Gordon, *The Robinson Rule: Models for Addressing Race Discrimination in the Hiring of NCAA Head Football Coaches*, 15 SPORTS LAW. J. 1, *8 n.33 (2008).

¹⁷⁷ See James E. Moliterno, *The Lawyer as Catalyst of Social Change*, 77 FORDHAM L. REV. 1559, 1568 (2009).

¹⁷⁸ See generally *United States v. Bajakajian*, 524 U.S. 321 (1998). See also Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 106th Cong. 91 (1999) (statement of Roger Pilon, Vice President for Legal Affairs, Cato Institute).

civil forfeiture statutes and the disregard for due process that is buried in those statutes.”¹⁷⁹ Federal judges voiced their concerns, and Congress listened.¹⁸⁰

Critical discussion of the harshness of civil forfeiture law also took hold in academic journals, popular books, special interest campaigns, and investigative articles published by general newspapers. Representative Henry Hyde forcefully advanced the need for change in his book *Forfeiting Our Property Rights*, in which he directly questioned whether private property was safe from seizure. He voiced concern about the violation of constitutional protections and the extent to which cherished liberties were lost in civil forfeiture cases. Summarizing his reasons for writing a book on this topic, Representative Hyde stated, “My personal belief, which prompted my writing this book, is that there is an immediate need for restoration of the constitutional principles that are debased by the current application of asset forfeiture laws.”¹⁸¹ Representative Hyde was not alone. Leonard A. Levy, a constitutional scholar, wrote *A License to Steal* in which he documented forfeiture abuses and expressed views that were highly critical of civil forfeiture practices.¹⁸²

The American Civil Liberties Union ran a media campaign exposing the dangers of civil forfeiture and took out a full-page advertisement in a Sunday *New York Times Magazine* condemning civil forfeiture practices.¹⁸³ General circulation newspapers

¹⁷⁹ *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992).

¹⁸⁰ *See generally* 146 CONG. REC. 3655 (2000) (statement of Sen. Patrick Leahy). Frequent references during the legislative process to critical language appearing in court opinions about civil forfeiture practices showed that Congress heard and valued the concerns of appellate courts on this subject. *See id.*

¹⁸¹ HYDE, *supra* note 94, at 4.

¹⁸² *See* LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* (1996).

¹⁸³ *See Advertisement*, American Civil Liberties Union, N.Y. TIMES MAG., April 29, 2001, at 135 (containing a picture of Uncle Sam pointing a gun at the reader with the statement below “I want your Money, Jewelry, Car, Boat and House.” The advertisement continued, “The forfeiture laws were designed as a new government weapon in the ‘war on drugs.’ But they’ve done little more than provide law enforcement with a license to steal.”). *See also Latest ACLU*

devoted substantial investigative resources to exposing the ills of civil forfeiture practices. The *Pittsburgh Press* published a six-day series reflecting ten months of national research on civil asset forfeiture in which reporters reviewed 25,000 drug seizures; interviewed 1,600 prosecutors, defense lawyers, cops, federal agents, and victims, and looked at court documents in 510 cases. The multi-part series concluded that “seizure and forfeiture, the legal weapons meant to eradicate the enemy, have done enormous collateral damage to the innocent.”¹⁸⁴

These varied writings were bolstered by empirical data which had a profound impact upon elected officials. Legislators routinely consider policy issues that are informed by empirical research.¹⁸⁵ Empirical data plays an important part in justifying the need for reform, especially when it involves research methods that extend beyond quantitative data and include research based upon observation and experience.¹⁸⁶ Empirical research is frequently used as a basis for amending statutes in the legislative process,¹⁸⁷ and while it does not necessarily provide answers to policy questions, it does raise the level of policy debate and can improve its conclusions.¹⁸⁸ If legislators are to make factual assumptions in legislation they sponsor or support, it is important that those assumptions be grounded in fact and empirical data can help to provide them with a better understanding of how laws play out in

Advertisement Targets Asset Forfeiture Laws, AMERICAN CIVIL LIBERTIES UNION (April 27, 2001), http://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/latest-aclu-advertisement-targets.

¹⁸⁴ Andrew Schneider & Mary Pat Flaherty, *Presumed Guilty, The Law's Victims in the War on Drugs*, THE PITTSBURGH PRESS, Aug. 11, 1991, <http://www.drugtext.org/library/specials/presumedguilty/index.html>.

¹⁸⁵ See Jennifer K. Robbennolt, *The Nebraska Death Penalty Study: An Interdisciplinary Symposium, Evaluating Empirical Research Methods: Using Empirical Research in Law and Policy*, 81 NEB. L. REV. 777, 778 (2002).

¹⁸⁶ See generally Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002).

¹⁸⁷ Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Use of Empirical Data in Formulating Bankruptcy Policy*, 50 L. & CONTEMP. PROBS. 195, 196 (1987).

¹⁸⁸ *Id.* at 197.

the real world.¹⁸⁹

Social science research is critical not just to the legislative process, but also to judicial decision making. It occupies a valuable role in the way that courts consider how information about social reality contributes to shaping the way society should be ordered,¹⁹⁰ and in how many leading legal questions should be resolved, such as the size of a jury in a criminal case,¹⁹¹ the application of Rule 11 of the Federal Rules of Civil Procedure,¹⁹² or capital punishment decision making.¹⁹³ Many agree that better information through social science data improves public policymaking.¹⁹⁴ Certainly, policy wonks urged Congress to base the nation's drug policy on

¹⁸⁹ See Peter J. Smith, *New Legal Fictions*, 95 GEO. L. J. 1435, 1448 (2007) (discussing the role of empirical data and social science research upon judicial decision making and the formulation of legal rules).

¹⁹⁰ See, e.g., Wallace D. Loh, *In Quest of Brown's Promise: Social Research and Social Values in School Desegregation*, 58 WASH. L. REV. 129, 163–64 (1982).

¹⁹¹ See *Ballew v. Georgia*, 435 U.S. 223, 231–39 (1978) (declaring unconstitutional a five-member jury in a criminal case and describing empirical data supporting the holding).

¹⁹² See Carl Tobias, *Some Realism About Empiricism*, 26 CONN. L. REV. 1093, 1098 (1994) (discussing the important role that empirical data on Rule 11's application and use played in the work of public policymakers, such as the Advisory Committee on Civil Rules, in formulating proposed amendments to the Rule).

¹⁹³ See Jennifer K. Robbennolt, *The Nebraska Death Penalty Study: An Interdisciplinary Symposium, Evaluating Empirical Research Methods: Using Empirical Research in Law and Policy*, 81 NEB. L. REV. 777, 777 (2002) (highlighting the extensive study of capital punishment decision making in Nebraska conducted by David Baldus and colleagues).

¹⁹⁴ See, e.g., Tobias, *supra* note 192, at 1103. There is, of course, considerable debate about the role that social science should play in the decision making of legal institutions. There is understandable tension between social science methodology, which “seeks quantifiable precision” in its measurements and attempts to statistically control for the effects of multiple variables, and the work of legal institutions that operate in “complex circumstances influenced by an indefinite variety of known and unknown factors.” See also Robert F. Schopp, *The Nebraska Death Penalty Study: An Interdisciplinary Symposium*, 81 NEB. L. REV. 479, 483 (2002). This debate is beyond the scope of this Article.

science and research, not ideology.¹⁹⁵

While empirical studies are essential, their effectiveness can be undermined if the data is too voluminous, complex, or indecipherable to be really helpful to decision-makers. In the legislative process, a simple statistic that captures the essence of the problem as it affects real people can serve effectively as a rallying call for change. In the movement to obtain civil forfeiture reform, one such statistic emerged as an effective rallying cry: *At least 80 percent of all civil forfeiture cases go unchallenged, without benefit of counsel.*¹⁹⁶ Over and over again, this statistic reminded legislators of the inescapable fact that the uphill challenge of litigating civil forfeiture cases and defending private property against the government resulted in at least eight out of every ten cases going uncontested.¹⁹⁷

Elected officials repeatedly asked law enforcement authorities to explain why there was such a high uncontested rate in civil forfeiture cases. They wanted to know who were the property owners who did not contest forfeiture.¹⁹⁸ Were property owners walking away from their property as a way of avoiding an indictment?¹⁹⁹ Or was it just too expensive or difficult to obtain a

¹⁹⁵ *Pros and Cons of Drug Legalization, Decriminalization, and Harm Reduction: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the H. Comm. on Government Reform*, 106th Cong. 181 (1999) (statement of Scott Ehlers, Senior Policy Analyst, Drug Policy Foundation).

¹⁹⁶ H.R. REP. NO. 105-358, pt. 1, at 28–29 (1997) (emphasis added).

¹⁹⁷ Civil Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the Committee on the Judiciary, 105th Cong. 148 (1997) (statement of David Smith, National Association of Criminal Defense Lawyers). *See also* Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 106th Cong. 90 (1999) (statement of Roger Pilon, Vice President for Legal Affairs, Cato Institute).

¹⁹⁸ *See* 145 CONG. REC. H4862 (daily ed. June 24, 1999) (statement of Rep. Sheila Jackson-Lee), 145 CONG. REC. H 4858, at *H4862 (LEXIS).

¹⁹⁹ Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 106th Cong. 90 (1999) (statement of Roger Pilon, Vice President for Legal Affairs, Cato Institute).

lawyer in order to litigate against the government? This one, simple statistic—that 80 percent of all civil forfeiture cases went uncontested—spoke powerfully and frequently to the fact that something was definitely wrong. Ordinary citizens were stripped of their property simply because they lacked access to the courts to stand toe-to-toe with the government, which, ironically, is always represented by a lawyer in court. The cases were often too expensive to litigate in relation to the value of property at stake.²⁰⁰ For low-income citizens who cannot afford a lawyer under any circumstances, they simply had no choice but to walk away even when they had meritorious arguments to present.

At its core, the ability to have a lawyer at one's side during frightening times when confronting superior governmental resources is what enables citizens to have access to the courts, a promise that is basic to a well-functioning democracy. The truth is that access to our courts is linked closely to having a lawyer by one's side,²⁰¹ and the absence of counsel unquestionably accounted for such a high uncontested rate in civil forfeiture cases.²⁰²

The 80 percent uncontested statistic was deeply disturbing to lawmakers. It posed a haunting question to which there never surfaced an entirely satisfactory answer, other than that there must be a serious flaw in the system. The success of our civil justice system depends upon ordinary citizens being able to tell their side of the story before any official action takes place that deprives them of their hard-earned gains. How is it that eight out of every ten property owners would simply walk away from their property without a fight, an explanation, or a defense?

If individuals were allowing their property to forfeit to the

²⁰⁰ For example, one civil forfeiture victim, Richard Apfelbaum, was a salesman carrying slightly less than ten thousand dollars on his way to Las Vegas to gamble when drug enforcement agents stopped him and conducted a consensual search. *See* LEVY, *supra* note 182, at 131. Upon finding the money, the agents confiscated the money and left him only thirty dollars to return home. *Id.* Initially, Apfelbaum fought back by posting a bond and hiring an attorney, but over time with attorneys' fees mounting, he gave up and was quoted as saying "I'm not in a position to spend \$10,000 trying to get \$9,000 back." *Id.*

²⁰¹ Kaufman, *supra* note 53, at 372.

²⁰² *See* H.R. REP. NO. 105-358, pt. 1 at 28–29 (1997).

government without a fight when they had a legitimate defense either because the burdens of the law were set too high or their defenses could not be presented without the help of a lawyer, confidence in the rule of law was clearly at risk. Eric Holder, then a high ranking member of the Justice Department, expressed this vital concern when he testified that “no tool of law enforcement, however effective at fighting crime, can survive for long if the public thinks that it violates the basic principles of fairness and due process that lie at the core of the American system of justice.”²⁰³ Congressman Hyde stated that he simply wanted to “give the average citizen who is not a sheriff, who does not have a relative in city council,” an opportunity at obtaining due process of law.²⁰⁴

The second lesson of civil forfeiture reform is that narrative stories, while powerful, are usually not enough by themselves to bring about needed change. Narrative stories gain real strength when joined with official validation from high sources and respected institutions, such as appellate courts, and when a broad range of voices are raised through academic articles, books, and investigative reports published in leading newspapers. And, significantly, these voices can crystallize behind a powerful, simple statistic which suggests that the game as it is playing out in the real world is fundamentally unfair. In the civil forfeiture context, that statistic was one which presented a haunting question that had no obvious answer other than that the system was simply unfair. A challenge for the civil Gideon movement will be to find an equally powerful statistic that highlights a fundamental flaw in the civil justice system when lawyers for the poor are absent.

This second lesson further illustrates how simultaneous efforts to obtain a right to counsel in both judicial and legislative forums paid off. While court efforts alone did not succeed, the observations and concerns expressed by appellate courts provided a powerful impetus for legislative change and focused national attention on the need for reform to protect basic rights. The civil

²⁰³ Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 106th Cong. 19 (1999) (statement Eric Holder, Deputy Att’y Gen., U.S. Department of Justice).

²⁰⁴ 145 CONG. REC. 14,128 (1999) (statement of Rep. Henry Hyde).

Gideon movement, as well, would benefit from continuing validation from appellate courts of the failings of the civil justice system when lawyers are not present, and much more can be said in books, newspapers, and social media about the unfair advantages conferred upon government and well-resourced parties in civil cases simply because an individual on the other side is too poor to afford a lawyer.

C. Lesson Three: Civil forfeiture reform attracted bipartisan support from a broad coalition of diverse interests that made legislative compromise possible and paved the way for the adoption of a right to counsel for indigent homeowners whose primary residences were at risk.

With compelling narrative stories from ordinary citizens and mounting concern expressed by courts, academics, and the media, reform advocates assembled a broad-based coalition of diverse interests that made bipartisan support and legislative consensus possible. The broad-based support for reform came from across the political spectrum and set the stage for reasonable compromise when difficult issues threatened to halt legislative progress. The depth of support from diverse organizations made the threat of a more robust right to counsel appear credible, forcing detractors to reach compromise on a more limited right to counsel for indigent homeowners facing seizure of their primary residence.

The civil forfeiture reform movement brought together the full range of political and philosophical ideology and presented a coalition of organizations that only come together once every ten years.²⁰⁵ This broad coalition of groups²⁰⁶ helped to advance legislation that struck the “right balance” in making common sense and adopting fair and equitable procedures.²⁰⁷ The movement attracted diverse support from such groups as the National Rifle Association, the American Civil Liberties Union, and the U.S.

²⁰⁵ 145 CONG. REC. 14,119 (1999) (statement of Rep. John Conyers).

²⁰⁶ 146 CONG. REC. 5227 (2000) (statement of Rep. Henry Hyde).

²⁰⁷ 146 CONG. REC. 5232–33 (2000) (statement of Rep. Sheila Jackson-Lee).

Chamber of Commerce. Like many other successful social movements, this reform initiative achieved results through the “participation of diversely located subjects whose immediate and direct interests might not coincide with those of the group’s agenda.”²⁰⁸ As Senator Leahy stated after agreement had been reached on the reform package, “[i]t is not often that we see the U.S. Chamber of Commerce, ACLU, NRA, National Association of Criminal Defense Lawyers, American Bankers Association, the Institute of Justice, Americans for Tax Reform, and the American Bar Association joining together on the same side of a legislative effort.”²⁰⁹

The reform movement’s themes of promoting fairness and protecting private property owned by innocent citizens resonated with both ends of the political spectrum. The fact that innocent property owners (those not even charged with an offense) enjoyed fewer rights than individuals accused of a crime when it came to gaining access to counsel in forfeiture cases was a troubling thought.²¹⁰ By providing an expanding right to counsel, Congress was able to address this problem which in turn lessened the concern that civil forfeiture practices might be adversely impacting racial minorities and encouraging racial profiling practices.²¹¹

Senator Lindsey Graham supported an expanded right to counsel in defense of one’s property against the federal government. He favored appointing counsel because it guaranteed one’s day in court. In his opinion, standing alone was “no place to be” when one’s property was seized by the government.²¹² When fighting the government for one’s own property, Senator Graham stated that it was only right that Congress provide for counsel.²¹³

The use of contrasts can be a powerful tool of persuasion. By

²⁰⁸ Purnima Bose, *From Agitation to Institutionalization: The Student Anti-Sweatshop Movement in the New Millennium*, 15 IND. J. GLOBAL LEGAL STUD. 213, 224 (2008).

²⁰⁹ 146 CONG. REC. 3654 (2000) (statement of Sen. Patrick Leahy).

²¹⁰ 146 CONG. REC. 5233 (2000) (statement of Rep. Sheila Jackson-Lee).

²¹¹ *Id.*, 145 CONG. REC. 14119 (1999) (statement of Rep. Henry Hyde, referring to study by *PITTSBURGH PRESS*).

²¹² 145 CONG. REC. 14,124 (1999) (statement of Rep. Lindsey Graham).

²¹³ *Id.*

focusing on stark contrasts between a right to counsel at public expense for property owners accused of a crime, from those who had no similar right simply because they faced no allegations of criminal wrongdoing, Congress struck a responsive chord. While a court was authorized to appoint counsel for an accused in a civil forfeiture case if it found certain statutory factors to be present,²¹⁴ innocent owners not accused of criminal wrongdoing appeared to enjoy no such protections. As a result, Senator Leahy supported a limited right to counsel permitting courts to authorize counsel to represent an indigent claimant when the claimant is already represented by a court-appointed counsel in connection with a related federal criminal case. He found this to be a fair compromise, one that eliminated “any appearance that the government chose to pursue the forfeiture in a civil proceeding rather than as part of the criminal case in order to deprive the claimant of his right to counsel.”²¹⁵ Representative Barney Frank shared this view, pointing out that the loss of property in a civil proceeding is no less damaging to an individual than if it is lost as a result of a criminal conviction.²¹⁶

There was disagreement in Congress about how far to extend a right to counsel in civil forfeiture cases. Some senators expressed the view that the House of Representatives had gone too far in its bill when it created a general right to counsel such that it was creating legal aid clinics for property owners in civil forfeiture cases.²¹⁷ However, where an indigent homeowner’s primary residence was at stake, leading senators recognized that possible eviction or even homelessness might result from the forfeiture of property.²¹⁸ As expressed by Senator Leahy, “[w]hen a forfeiture

²¹⁴ H.R. Rep. No. 105-358, pt. 1, at 29 (1997) (a court could appoint counsel if it found three factors identified in 983(d)(A) –(C) of Title 18 to be present).

²¹⁵ 146 CONG. REC. 3656 (2000) (statement of Sen. Patrick Leahy).

²¹⁶ 145 CONG. REC. 14,127 (1999) (statement of Rep. Barney Frank).

²¹⁷ See Civil Asset Forfeiture Reform Act, S. 1931, 106th Cong. § 981A(b) (1999) which takes a different approach from the House on the issue of appointment of counsel. The Senate narrowed the right to counsel to indigent homeowner’s whose primary resident was at stake. *See infra* note 220.

²¹⁸ 146 CONG. REC. 3,656 (2000) (statement of Sen. Patrick Leahy).

action can result in a claimant's eviction and homelessness, there is more at stake than just a property interest, and it is fair and just that the claimant be provided with an attorney if he cannot otherwise afford one."²¹⁹

This basic concern, shared across the broad coalition of supporters of reform, led to compromise that provided for a right to counsel at public expense for indigent homeowners whose primary residences are the subject of civil forfeiture proceedings.²²⁰ The new legislation designated the Legal Services Corporation to administer this limited right to counsel for indigent homeowners. The stage for this compromise was set when the House Judiciary Committee included strong overall right to counsel language in the House bill. The Senate reached agreement when the Hatch-Leahy Civil Asset Forfeiture Reform Act²²¹ was joined with proposed language from the Sessions-Schumer bill, culminating in a Hatch-Leahy-Sessions-Schumer substitute amendment that was passed by the Senate on March 27, 2000.²²² While the appointment of the Legal Services Corporation ("LSC") for the implementation of this important new limited right to counsel was not something specifically requested by LSC, bipartisan compromise in the Senate emerged as a means of heading off a broader right to counsel that might otherwise have applied to all civil forfeiture actions.²²³

The third lesson of civil forfeiture reform is that broad-based

²¹⁹ *Id.*

²²⁰ See 146 CONG. REC. S1753, S1759-60 (2000). The broad coalition of support led to an agreement on March 26, 2000, with Hyde, Leahy, Sessions, and Schumer coming together. They were influenced by the knowledge that Vermont Law, Vt. Stat. Ann. Tit. 18 § 4241(a)(5), did not permit forfeiture of real property occupied as primary residence of a person involved or a member of that person's family. *Id.*; see also Vt. Stat. Ann. Tit. 18 § 4241(a)(5) (2009).

²²¹ Civil Asset Forfeiture Reform Act, S. 1931, 106th Cong. (1999).

²²² See 146 CONG. REC. 3655 (2000) (statement of Sen. Patrick Leahy).

²²³ Senator Sessions opposed efforts to have CJA counsel provide representation as a matter of right in such cases, concerned that such an extension would be "camel's nose" to a broader right to counsel. Instead, he agreed to a compromise offered by Senator Leahy of substituting LSC attorneys for CJA attorneys. See DAVID D. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES 11-12 n.14.6 (1999).

support from organizations representing the full political and ideological spectrum enables a controversial bill to move through the legislature, even in the face of powerful opposing interests. Moreover, such broad and deep support can set the stage for reasonable compromise that allows the legislation to move forward. Here, the threat of an unconditional right to counsel in all civil forfeiture proceedings was deemed credible because of the depth of support from diverse organizations and interests that rarely agree. As a result, opposing views were able to reach compromise on a more limited right to counsel when it was specifically targeted to the most serious need (protecting primary residences) of those individuals most in need (indigent homeowners).

The civil *Gideon* movement has attracted strong support from the organized bar and from those organizations directly involved in the delivery of civil legal assistance to the poor. But the question remains whether the current coalition is broad enough to wield sufficient legislative influence that will be needed when legislation proposing such a right is challenged by opponents on philosophical or cost grounds. At those times, will the movement to establish a civil *Gideon* be said to have the support of diverse interests that come together only once every ten years? If the answer is likely not, efforts should be undertaken to expand the base of support, looking for ways to strike common ground with business, governmental, religious, and other interests not always associated with efforts to support the delivery of legal services to the poor. Civil forfeiture reform demonstrates the value of having this support and offers hope that it is indeed possible.

D. Lesson Four: A proposed right to counsel in civil forfeiture proceedings was not viewed as an end in of itself, but rather as a means of insuring that other needed civil forfeiture reforms, if adopted, would succeed.

Lawyers readily understand the vital role that they play in achieving the goals of their clients and, not surprisingly, therefore regard a right to counsel as a noble end in of itself. The current right to counsel coalition certainly ties its *raison d'être* to achieving

this procedural goal, even though more substantive social justice interests are likely the primary concerns of this movement. This approach makes good sense to members of the legal profession whose training and experience strongly inform their perspective. But this view threatens to be too limiting and may even be counterproductive as the general public does not necessarily place such a high premium on procedural protections. The public is more likely to demand legislative change when substantive concerns violate their notions of justice and fairness and undermine their respect for the law. Lawyers are important, for sure, but they play a secondary role to substantive interests that are front and center.²²⁴

This suggests that the public may not be inclined to rally behind a general right to counsel as an abstract principle of justice, however noble it is, but might be willing to demand of their elected officials such a right if they see it as necessarily connected to achieving an overriding substantive interest. In civil forfeiture reform, access to legal assistance was viewed as a necessary adjunct to protecting against the wrongful loss of private property to the government, especially when the property at risk was the family home. Procedure was tied tightly to substance. In other civil matters, the public may not fully understand the need for a lawyer. For example, the public might initially be unsympathetic to a general right to counsel at the public expense in all housing or real estate matters, but might be willing to demand such a right if there is not widespread confidence that legislation designed to eliminate lending practices that threaten homeownership can succeed without a lawyer to assist an indigent homebuyer. In other words, the creation of limited rights to counsel in other areas of civil law might be most viable where the success of important substantive reforms hinges upon the inclusion of such a limited right to

²²⁴ Lawyers naturally look to the courts first for support of their argument that there should be a right to counsel because they expect that judges, as lawyers, understand the close relationship between due process of law, fundamental fairness, and an adversary system in which both sides are represented by counsel. When lawyers turn to the legislature for support, it is not as clear that they will receive the same understanding or support about this relationship, especially as the percentage of lawyers serving as legislators declines across the country.

counsel to make sure that important legislative objectives succeed.

This was the case in civil forfeiture reform. While access to counsel was viewed as an important part of the reform package, it was not viewed as an end in of itself. Rather, the enactment of CAFRA represented the culmination of a decade-long effort to enact a broad range of reforms to insure that property was not wrongly taken from individuals by the government. As one ACLU representative testified, the appointment of counsel for indigents was absolutely needed in order to ensure that individuals would be able to avail themselves of the other reforms in the bill.²²⁵

This is not to suggest, however, that the public does not place a high value on the abstract principle of requiring access to legal help in civil matters, especially on behalf of poor or unsophisticated individuals who lack the means to battle superior governmental resources. But, in the case of civil forfeiture reform, legislators understood that representation by counsel was directly connected to the overall fairness of the entire adjudicatory framework. In other words, no matter how hard legislators tried to design fair civil forfeiture procedures, the process might never really be fair if a property claimant was forced to represent herself against the government.²²⁶ Chairman Henry Hyde embraced this view when he noted that in a democracy the *means* can be as important as the ends.²²⁷ Even a fairer law and simplified procedures might not succeed if a property owner had to face it alone.²²⁸

²²⁵ See Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the Committee on the Judiciary, 104th Cong. 274–275 (1996) (statement of Mark Kappelhoff, ACLU).

²²⁶ See Civil Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the Committee on the Judiciary, 105th Cong. 135 (1997) (statement of David Smith, National Association of Criminal Defense Lawyers) (“No matter how fair the formal civil forfeiture procedures are, the process can never really be fair if a claimant is forced to represent herself.”).

²²⁷ See Civil Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the Committee on the Judiciary, 105th Cong. 2 (1997) (statement of Rep. Henry Hyde) (emphasis added).

²²⁸ Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 106th Cong. 85 (1999) (statement of Samuel Buffone, Nat’l

However, not everyone shared this basic belief. Eric Holder, then a deputy attorney general in the Department of Justice, testified that the proposed appointment of counsel in civil forfeiture proceedings was one of the two most objectionable provisions of the House version of the reform bill.²²⁹ He expressed concern that it was an incentive for abuse and, if adopted, would overburden courts with appointment motions. Some executive agency representatives also expressed concern that an expansion of access to counsel would increase the number of cases on crowded federal court dockets and encourage litigation of plainly forfeitable property interests.²³⁰ Holder argued that the attorney's fees provision in the Equal Access to Justice Act ("EAJA") provided sufficient protection for property owners. Under that federal law, attorney's fees can be awarded to a prevailing party against the government if the government's position is not substantially justified. While the Justice Department supported some aspects of forfeiture reform, it did not support the appointment of counsel as a matter of right.²³¹

Law enforcement officers also testified against the proposed appointment of counsel in civil forfeiture actions, arguing that the appointment of counsel for indigents would divert significant assets to the criminal defense bar,²³² and only encourage attorneys

Ass'n of Criminal Defense Lawyers).

²²⁹ Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 106th Cong. 22 (1999) (statement Eric Holder, Deputy Att'y General, U.S. Dep't of Justice) (arguing that H.R. 1658 was too broad and that the two most objectionable parts were its appointment of counsel provision and its proposed change in the standard of proof).

²³⁰ See Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the Committee on the Judiciary, 104th Cong. 240 (1996) (statement of Jan Blanton, Director, Executive Office for Asset Forfeiture, Dep't of Treasury).

²³¹ Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 106th Cong. 22 (1999) (statement Eric Holder, Deputy Att'y General, U.S. Dep't of Justice).

²³² Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the Comm. on the Judiciary, 104th Cong. 244 (1996) (statement of James McMahon, Superintendent, NY State Police, Internat'l Ass'n of Chiefs of

to look for court appointments to file frivolous claims.²³³ One South Carolina sheriff called the bill an “entitlement program for lawyers,” arguing that the law-abiding citizens should not be forced to pay for legal services for wealthy drug dealers and criminal syndicates to defend their criminal activities.²³⁴ In short, some law enforcement representatives and government officials opposed a right to counsel on the basis that the potential for abuse was too great, there were insufficient safeguards, and federal law (EAJA) already provided for fee shifting under limited circumstances.

On the other hand, the American Bar Association strongly endorsed civil forfeiture reform, including the provision of counsel for indigents, on the basis that civil forfeiture law disregarded basic principles of due process.²³⁵ The ABA relied upon the Second Circuit’s strong language in the *U.S. v. All Assets of Statewide Auto Parts* case, expressing concern about the lack of fairness in civil forfeiture proceedings.²³⁶ Criminal defense experts argued that the appointment of counsel would provide a legally trained champion to get seized property back into the hands of the lawful owner, representing the first step toward achieving fundamental due process.²³⁷

Police).

²³³ Civil Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the Comm. on the Judiciary, 105th Cong. 120 (1997) (statement of Stefan Cassella, Assistant Chief, Asset Forfeiture and Money Laundering Section, U.S. Dep’t of Justice).

²³⁴ Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 106th Cong. 71 (1999) (statement of Sheriff Johnny Mack Brown).

²³⁵ See Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the Committee on the Judiciary, 104th Cong. 260 (1996) (statement of Terrence Reed, Am. Bar Ass’n). Civil Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the Comm. on the Judiciary, 105th Cong. 134 (1997) (statement of David Smith, Nat’l Ass’n Criminal Defense Lawyers).

²³⁶ Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the Comm. on the Judiciary, 104th Cong. 258 (1996) (statement of Terrence Reed, Am. Bar Ass’n).

²³⁷ Civil Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the

Although he objected to an expanded right to counsel, Stefan Casella, a justice department official responsible for civil forfeitures, conceded that it was more important than ever that forfeiture laws operated fairly, that citizens enjoy access to the courts, and that property interests of innocent owners be fully protected.²³⁸ Describing the historical context for the nation's use of civil forfeiture powers, Casella testified that federal forfeiture laws were used primarily in the past to forfeit items that had no legitimate basis, such as pirate ships, contraband goods, and whiskey stills. The war on drugs, however, had expanded the use of federal forfeiture laws to people's primary possessions, including their homes, cars, and cash. The application of forfeiture laws to legitimate items of fundamental importance to citizens raised the stakes, according to Casella, and with it the need to ensure fundamental fairness.

With powerful interests on both sides of this question, a limited right to counsel emerged as the means to make civil forfeiture procedures fairer for ordinary citizens and to attack the high incidence of uncontested actions. With only a limited right to counsel to fund, Congress easily identified a ready source of funding in the proceeds of forfeited property. Property forfeited to the government had proven profitable and the civil asset forfeiture fund netted millions of dollars for law enforcement budgets and special drug fighting initiatives. These funds could accommodate relatively modest expenditures for counsel fees to assure that the operation of the forfeiture program was fundamentally fair and that real property belonging to indigent homeowners was protected from erroneous deprivation.

Of course, cost remains a huge concern when discussing the enactment of a right to counsel. Thus far, attempts to place a dollar figure on a right to counsel in civil matters are extremely

Comm. on the Judiciary, 105th Cong. 135 (1997) (statement of David Smith, Nat'l Ass'n of Criminal Defense Lawyers).

²³⁸ Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the Comm. on the Judiciary, 104th Cong. 220-21 (1996) (statement of Stefan Cassella, Assistant Chief, Asset Forfeiture and Money Laundering Section, U.S. Dep't of Justice).

speculative.²³⁹ Especially in difficult economic times, this is not an easy issue to tackle. This is why it is so important to quantify through statistically reliable studies the savings that can be achieved by providing counsel. Some studies suggest that spending public dollars on civil legal services can save the public triple or quadruple the amount that would need to be spent later if counsel is not provided.²⁴⁰ One recent Texas study found that every dollar spent in the state for indigent civil legal services generated an additional \$7.14 in total spending, \$3.56 in output, and \$2.20 in personal income.²⁴¹ This resulted in an additional \$457.6 million in business spending and the creation of 3,171 jobs.²⁴² However, there are still relatively few economic studies of this kind and there are difficulties in measuring precisely such financial gains. Alternatively where, as here, a particular subject area of the law provides a readily-tapped fund, such as the federal civil asset forfeiture fund, the financial cost question is a much easier one to answer.

As the foregoing discussion makes clear, powerful interests are likely to disagree about the wisdom, desirability, or affordability of a civil right to counsel. This is why it may be helpful to reframe the basic question. The fourth lesson of civil forfeiture reform is that a civil right to counsel may be more widely acceptable if it is viewed not as the primary objective, but rather as the means by which to ensure the success of other important legislative goals. The prospects of establishing a right to counsel might also be improved by limiting that right to cases involving the most serious

²³⁹ Kaufman, *supra* note 53, at 384–85 (suggesting that even an estimate of five to nine billion dollars per year may be inadequate, based upon a calculation of fifty to ninety million eligible clients each year, spending an average of \$100 per client).

²⁴⁰ See Bernice K. Leber, *The Time for Civil Gideon is Now*, 25 *TOURO L. REV.* 23, 26 (2009) (citing a New York City Department of Social Services report that finds that for every dollar spent on indigent representation in eviction proceedings, four dollars in costs related to homelessness are saved).

²⁴¹ THE PERRYMAN GROUP, *THE IMPACT OF LEGAL AID SERVICES ON ECONOMIC ACTIVITY IN TEXAS: AN ANALYSIS OF CURRENT EFFORTS AND EXPANSION POTENTIAL* (2009), <http://www.texasatj.org/files/file/Perryman%20Report.pdf>.

²⁴² *Id.* at 3.

needs, at least initially. In a legislative forum, the focus should be on the substantive objectives of housing the poor, nourishing young children, or protecting the elderly. A right to counsel should not be the banner headline, but rather the means to making these laudable goals possible.

E. Lesson Five: The adoption of a limited right to counsel at public expense in civil forfeiture cases serves as further proof that Congress values the essential role that lawyers play in achieving important legislative goals and that providing lawyers makes a significant difference in case outcomes.

In *Gideon*, the Supreme Court acknowledged that the right to be heard would in many cases be of little avail if it did not include the right to be heard by counsel. Certainly, this turned out to be true in the retrial of Clarence Gideon's criminal case. After the Supreme Court's ruling, Gideon was retried by Florida authorities, but this time the trial court appointed an experienced lawyer to represent him.²⁴³ By some accounts, Gideon's appointed lawyer skillfully picked apart suspect eyewitness testimony on cross-examination, suggesting in the process that the eyewitness who originally testified against Gideon was actually a lookout for a group of young men who were the real perpetrators of the crime.²⁴⁴ Gideon's lawyer also introduced new key evidence from a taxi cab driver who drove Gideon from the pool hall on the day of the burglary and was able to refute the prosecution's contention that Gideon was carrying stolen items when he left the pool hall. Counsel did a masterful job of defending Gideon²⁴⁵ and at the

²⁴³ Interestingly, the ACLU offered to represent Gideon on retrial, but Gideon wanted an experienced local lawyer. With Gideon's agreement, the Florida court appointed W. Fred Turner, a lawyer with an excellent reputation for criminal defense representation in the court's jurisdiction. See Jacob, *supra* note 8, at 257. The Gideon trial occurred five months after the Supreme Court's ruling in *Gideon*.

²⁴⁴ See ANTHONY LEWIS, *GIDEON'S TRUMPET* (Random House 1964); Jacob, *supra* note 8, at 265.

²⁴⁵ Jacob, *supra* note 8, at 269 (Turner did a masterful job of defending

conclusion of the trial the jury acquitted Gideon after only one hour of deliberation.²⁴⁶

There is little doubt that a trained lawyer makes an important difference in legal proceedings. Empirical studies demonstrate that litigants in court and agency proceedings have a significantly greater chance of success when they are represented by counsel.²⁴⁷ Recent articles report that “studies of courts and administrative agencies consistently show that indigent litigants without counsel routinely forfeit basic rights, not due to the facts of their cases or the governing law, but due to the absence of counsel.”²⁴⁸

In civil forfeiture actions, courts have readily acknowledged the importance of counsel because the legal framework is complicated, the cases are fact-intensive, and claimants must assert affirmative defenses or otherwise they will be waived. Needless to say, the government is always represented by a lawyer in civil forfeiture cases. The truth is that in civil forfeiture cases, having

Gideon, proving the underlying assumption of the Supreme Court’s decision that “being represented by counsel makes a tremendous difference.”).

²⁴⁶ LEWIS, *supra* note 244, at 237 (reporting that the jury went out at 4:20 pm and at 5:25 pm there was a knock on the door between the courtroom and the jury room, following which the jurors filed in and the verdict was announced).

²⁴⁷ See Engler, *Connecting*, *supra* note 85 (reviewing studies that show that absence of counsel affects outcomes in a broad range of civil legal matters); Kaufman, *supra* note 53, at 366; William Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 CORNELL L. REV. 989 (1977); Carroll Seron, Martin Frankel, Gregg Van Ryzin & Jean Kovath, *The Impact of Legal Counsel on Outcomes for the Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419 (2001). But see D. James Griener & Cassandra Wolos Pattanayak, *What Difference Representation?* (Jan. 12, 2011), available at <http://ssrn.com/abstract=1708664> (concluding that representation in administrative unemployment compensation hearings had no effect on the probability of success and caused delay in the resolution of unemployment claims).

²⁴⁸ Gary Toohey, Missouri Bar Ass’n, *A Civil Right to Counsel: Inevitable or Unrealistic*, PRECEDENT, 2010, at 25–26, available at <http://members.mobar.org/pdfs/precedent/feb10/civil.pdf> (citing BOSTON BAR ASS’N TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON’S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS (2008)).

counsel matters because there is so much that can be said.²⁴⁹

The first decade of experience applying CAFRA's right to counsel for indigent homeowners in civil forfeiture cases appears to lend support to the basic proposition that with counsel, the chances of improved outcomes and of preserving basic human rights are increased,²⁵⁰ whereas without counsel, litigants face worse outcomes.²⁵¹ The first years under CAFRA have produced surprisingly few court appointments; arguably, the sample of cases remains too small to draw any firm conclusions. Nevertheless, the results are instructive.²⁵² What limited results are available point

²⁴⁹ Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 106th Cong. 85 (1999) (statement of Roger Pilon, Vice President for Legal Affairs, Cato Institute) H.R. 1835, June 11, 1997 Testimony of Roger Pilon.

²⁵⁰ See generally BOSTON BAR ASS'N, TASK FORCE ON CIVIL RIGHT TO COUNSEL, *supra* note 248; Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002) (concluding that when lawyers are appointed at pretrial bail hearings, large numbers of defendants avoided incarceration). See also Engler, *Connecting*, *supra* note 85, at 92 (concluding that available studies consistently reveal the importance of representation as an important variable in improving success rates and that disparities in case outcomes between represented and unrepresented parties shows that the presence of lawyers impacts case outcomes).

²⁵¹ See Carter, *supra* note 57, available at [http://www.abajournal.com/news/article/judges_say_litigants_increasingly_going_pro_se--at_their_own_/](http://www.abajournal.com/news/article/judges_say_litigants_increasingly_going_pro_se--at_their_own/) (reporting the view of judges that self-representing is increasing and producing worse outcomes for litigants).

²⁵² When CAFRA was passed, the Congressional Budget Office projected that an automatic right to counsel involving primary residents of indigents would increase annual spending by approximately one million dollars over a five-year period. This suggested that, at fixed compensation levels established by the statute, LSC would be expected to represent as many as 285 eligible homeowners each year. See Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 FED. SENT'G REP. 87, 89 & n.32 (2001). For reasons that are unclear and beyond the scope of this article, that projection has not come to pass. Instead, there were only twenty-eight LSC appointments during the entire period from 2000–2007. See Response to Freedom of Information Request from Legal Services Corp. to author (May 13, 2009) (on file with author).

clearly toward the conclusion that the presence of counsel affects outcomes.

During the period of 2000 through mid-2007, federal courts appointed the Legal Services Corporation only twenty-eight times to represent indigent homeowners whose primary residences were the subject of civil forfeiture proceedings.²⁵³ Without a right to counsel, one might expect that roughly 80 percent of the cases would be uncontested or, in other words, roughly twenty-four of the twenty-eight cases would result in a forfeiture of property to the government by default.²⁵⁴ With appointed counsel, however, all of the cases were contested. In at least two of the cases, default judgments that had been entered originally by the court were set aside after counsel were appointed to represent indigent homeowners.²⁵⁵

In many of the cases, the person alleged by the government to have engaged in drug trafficking and the homeowner were not the same person. Of the cases in which it was possible to discern from court filings the relationship between the alleged wrongdoer and homeowner, it appears that the alleged wrongdoer was the homeowner only 38.1 percent of the time, while in the majority of the cases (or 61.9 percent of the time), the alleged wrongdoer was someone other than the homeowner.²⁵⁶ Of the cases in which the alleged wrongdoer was not the homeowner, the alleged wrongdoer

²⁵³ See Response to Freedom of Information Request from Legal Services Corp. to author (May 13, 2009) (on file with author).

²⁵⁴ Admittedly, this is a broad generalization drawn from the 80 percent overall uncontested rate in civil forfeiture proceedings discussed previously in this Article. To know whether this high uncontested rate applies equally to civil forfeiture cases involving primary residences of property claimants would require extensive empirical analysis that is beyond the scope of this article.

²⁵⁵ See, e.g., *United States v. Real Prop.* Located at 130 High Rock Acres Drive, Black Mountain, N.C., No. 1:06CV290, 2007 WL 1959245, at *1 (W.D.N.C. July 3, 2007); *United States v. Real Prop.* Located at 70 Centennial Ave., Chico, Cal., No. 08-01107 (E.D. Cal. 2008) (on file with author).

²⁵⁶ It was possible to discern the relationship between the alleged drug trafficker and the homeowner in twenty-one of the twenty-eight cases. Of those twenty-one cases, the alleged drug trafficker and the homeowner were the same person in eight of the cases. See Response to Freedom of Information Request from Legal Services Corp. to author (May 13, 2009) (on file with author).

was a family member in 33.3 percent of the cases, involved in a relationship with the homeowner (but was not a family member) in 23.8 percent of the cases, and totally unrelated to the homeowner in 4.7 percent of the cases. Assuming that the government is able to show a nexus between the illegal drug activity and the home, the relationship between the alleged wrongdoer and the homeowner is very important because of statutory defenses, such as the innocent owner defense, that may be asserted to prevent forfeiture. A homeowner should be able to prevail in court so long as he or she can prove they did not know of or did not consent to drug activity at the property. The pool of cases decided under CAFRA so far suggests that a meritorious innocent owner defense was available to homeowners in 61.9 percent of the cases, thereby validating the critical importance of having a lawyer present to assert and prove such a defense.²⁵⁷

Case outcomes in this small universe of civil forfeiture cases also support the important role that a lawyer plays once provided to an indigent litigant. In some cases, the assistance of counsel enabled homeowners to hold the government to its legal burdens and ultimately to have the government's forfeiture action dismissed.²⁵⁸ Even where criminal activity may have taken place, homeowners were still able to save their homes because they had not personally engaged in wrongdoing and their lawyers asserted innocent owner defenses that would have been otherwise waived.²⁵⁹ Here, legal help provided an effective means of checking government power and fulfilling congressional intent that innocent homeowners not forfeit their homes to the government.

In still other cases, where homeowners were allegedly responsible for the drug activity at the property, representation by a lawyer permitted the parties to explore creative resolutions that

²⁵⁷ In thirteen of the twenty-one cases, the property claimant (homeowner) was not the alleged wrongdoer. *See* Response to Freedom of Information Request from Legal Services Corp. to author (May 13, 2009) (on file with author).

²⁵⁸ *See, e.g.,* United States v. Freedom, N.H., 28 Ski Doo Alley, No. 07-0397 (D. N.H. 2007) (on file with author).

²⁵⁹ *See, e.g.,* United States v. Land and Buildings Located at 60 Sawmill Hill Rd., Berwick, Me., No. 06-0033 (D. N.H. 2006) (on file with author).

halted wrongful activity and met legitimate governmental interests, but at the same time protected the interests of innocent children residing in the property.²⁶⁰ In cases such as these, the real victims of a forfeiture of the family home to the government are the innocent children who then face shelter disruption, educational displacement, and even homelessness. With help from a lawyer, an indigent homeowner is not inclined to just give up, but is able to negotiate for a possible settlement of the forfeiture action that offers the promise of protecting his or her children from falling further into poverty. This could take the form of holding the real property in trust for the children, selling the property and placing proceeds from the sale in a trust for the children's educational needs, or even refinancing the home to pay the government a sum of money as a substitute for forfeiture while still retaining the family home for the benefit of the children. The presence of counsel on both sides of the forfeiture action allows for meaningful negotiations and amicable resolutions that often better serve competing societal interests.²⁶¹

This type of beneficial outcome was achieved in a North Carolina case in which a homeowner and his girlfriend resided in the family home with their minor children.²⁶² The police arrested the homeowner for growing marijuana at the property after they were called to the home in response to a domestic violence complaint. The government commenced a civil forfeiture action against the real property and, without counsel for the homeowner, a default judgment was entered in favor of the government. After a lawyer was appointed under CAFRA to represent the indigent homeowner, the default judgment was set aside. Soon thereafter, the homeowner died leaving the home to his children in his will. Counsel raised defenses to the forfeiture action on behalf of the children as property claimants and negotiated a resolution that

²⁶⁰ See, e.g., *United States v. Approx. \$3,432 in U.S. Currency, and Certain Real Prop. Commonly Known as 9665 S. Nicholson Rd., Oak Creek, Wis.*, No. 02-0926 (E.D. Wis. 2002) (on file with author).

²⁶¹ *Id.*

²⁶² *United States v. Real Prop. Located at 130 High Rock Acres Drive, Black Mountain, N.C.*, No. 1:06CV290, 2007 WL 1959245, at *1 (W.D.N.C. July 3, 2007).

authorized the sale of the property with the net proceeds to be placed in trust for the minor children.²⁶³ Without counsel, it is likely that the default judgment would not have been set aside and the children would have been dislodged from their home without receiving any financial support from the equity of the property.

It is difficult to draw firm conclusions from the relatively small number of case outcomes during the first seven or so years under CAFRA in which indigent homeowners received lawyers as a matter of right. Still, it is telling that of twenty-one cases in which a final outcome has now been reached (out of a total of twenty-eight appointments), three cases resulted in outright dismissals of the forfeiture actions and fifteen more resulted in amicable settlements that brought modest or substantial benefit to the homeowner, including the retention of family homes in many of the cases. In approximately 43 percent of the cases reaching final resolution, homeowners held on to their property without any payment or with just a relatively small payment of settlement monies to the government.²⁶⁴ These overall outcomes would not

²⁶³ Consent Order and Judgment of Forfeiture May 6, 2008, *Real Prop. Located at 130 High Rock Acres Drive, Black Mountain, N.C.*, 2007 WL 1959245 (court order available from the PACER court document database).

²⁶⁴ In reviewing the twenty-eight cases provided by the Legal Services Corporation in response to the author's freedom of information request, outcomes were coded in seven classifications: actions still ongoing, rulings in favor of the U.S., rulings in favor of the property claimant, settlements in favor of the U.S., settlements slightly in favor of the property claimant, settlements substantially in favor of the property claimant, and unavailable (documents sealed). Codings were based entirely upon document review obtained from the PACER court document database. Admittedly, discretion was used in classifying settlement outcomes as favorable to the U.S. or slightly or substantially favorable to the property claimant. The category of settlement outcome favorable to the U.S. was used when all of the property in question was forfeited to the U.S., with the claimant receiving nothing, or when the settlement amount was the equivalent of the value of the property. The category of settlement outcome slightly favorable to the property claimant was used when the claimant had to pay a substantial amount in lieu of forfeiting the property, or when the property was sold with the claimant receiving a right to some portion of the proceeds. The category of settlement outcome substantially favorable to the property claimant was used when the claimant only had to pay a modest amount in lieu of forfeiture of the property, or if the property was dismissed

have been possible without a right to counsel.

The fifth lesson from civil forfeiture reform is that case outcomes are directly affected by having a trained lawyer at one's side. Congress understood this basic proposition when it insisted that indigent homeowners have a right to counsel as a vital part of its reform legislation. It recognized that providing counsel to the poor offered indigent homeowners the best chance of ensuring that reform measures succeeded, that an unacceptably-high uncontested rate in civil forfeiture actions decreased, and most significantly that family homes received adequate legal protection from erroneous government forfeiture. Moreover, the early data demonstrates that concerns expressed to Congress that a right to counsel would be abused or would unduly burden the courts were unfounded. While final tallies of case outcomes are still unfolding, the early data suggests that Congress' judgment was absolutely correct.

CONCLUSION

Federal civil forfeiture reform offers important lessons for the civil Gideon movement. In the twenty-one years between the Supreme Court's rulings in *Betts v. Brady* and *Gideon v. Wainwright*, there were substantial developments in the states that expanded the provision of counsel at public expense in criminal matters and created a climate that made the Supreme Court's landmark decision in *Gideon* possible. With each local expansion, the national movement for a right to counsel in serious criminal proceedings grew stronger.

Almost thirty years after the Supreme Court's decision in *Lassiter v. Department of Social Services*, the movement to obtain a civil right to counsel where basic human needs are at stake has found new momentum. The enactment of a statutory right to counsel as part of federal civil forfeiture reform adds significantly to this movement and provides valuable lessons on the dynamics of successful legislative change. While CAFRA provides a statutory right to counsel only for indigent property owners whose primary

from the proceeding as part of the settlement agreement. See Response to Freedom of Information Request from Legal Services Corp. to author (May 13, 2009) (on file with author).

residences are at risk, and does not protect all property owners in federal forfeiture proceedings (or for that matter in the much larger number of state forfeiture cases where the property interests of indigents are at greatest risk), the enactment of this limited federal right to counsel is still a powerful illustration of the vital role that lawyers play to ensure that the poor have meaningful access to the civil justice system and are able to protect their most important interests.

Lassiter v. Department of Social Services is most assuredly the civil parallel to *Betts v. Brady*. Just as *Betts* before it, *Lassiter* tilts the scales away from justice for millions of poor Americans when their most basic human needs are at stake. If judges are to “administer justice without respect to persons, and do equal right to the poor and to the rich,” as their oath requires, they need to preside over fair contests in which the poor have the benefit of a lawyer.²⁶⁵ The road to a civil *Gideon* may be difficult and long, but with each newly-created civil right to counsel in diverse subject areas of state and federal law, our nation draws closer to delivering on its promise of equal justice under law.

²⁶⁵ Supreme Court justices each take this oath as provided for in Title 28, Chapter I, Part 453 of the U.S. Code Oaths of Justices and Judges, 28 U.S.C.A § 453 (West 2010).